CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 104

BANKERS POCAHONTAS COAL COMPANY,
PETITIONER,

vs.

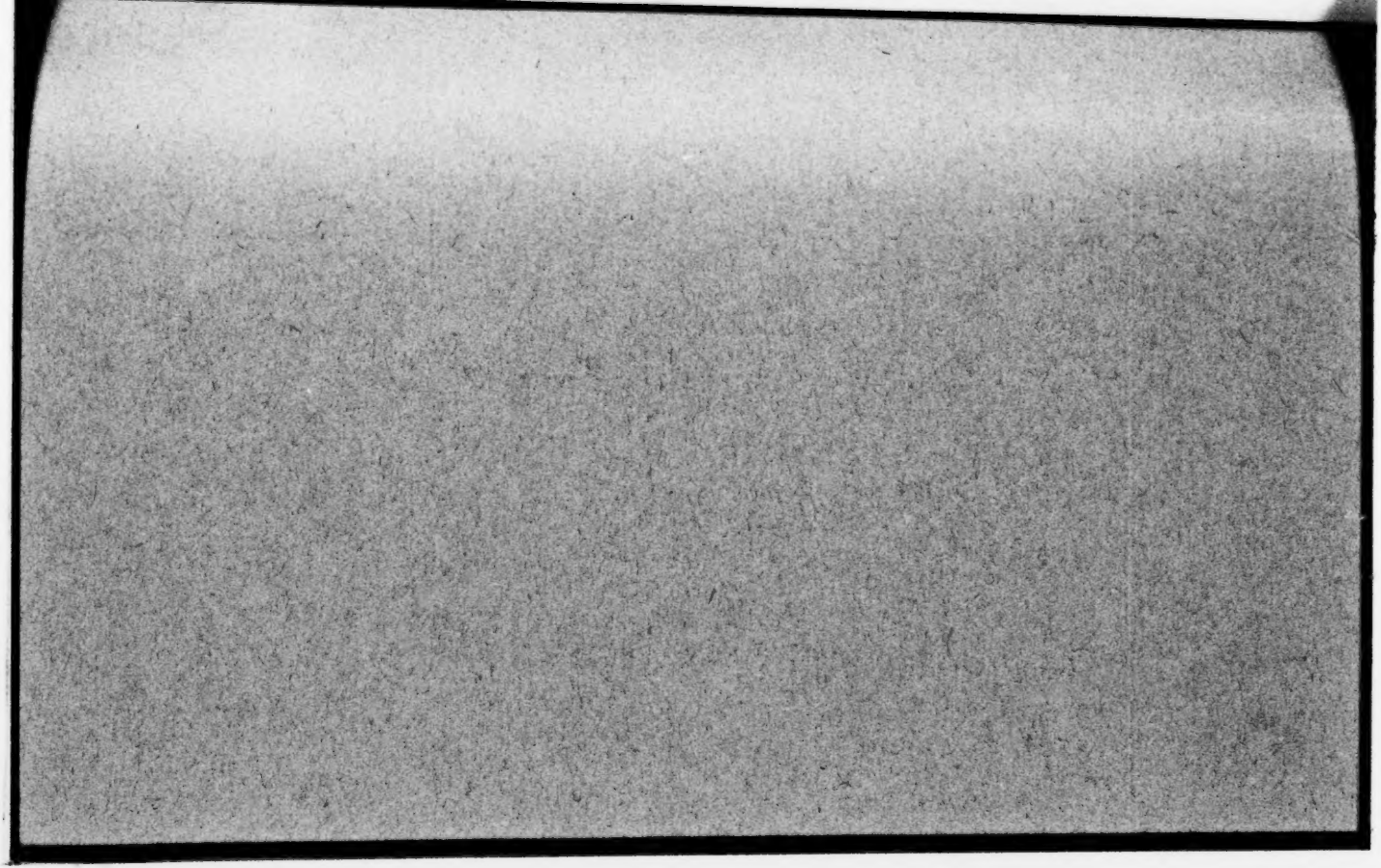
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,801)



(36,801)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 104

BANKERS POCAHONTAS COAL COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TRANSCRIPT OF RECORD

Docket Nos. 14516-17

Appearances:

For Petitioner:
Camden R. McAtee, Esq.,

For Respondent:
M. E. McDowell, Esq.,
W. F. Gibbs, Esq.,
F. Schlosser, Esq.

Bankers Pocahontas Coal Company,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

DOCKET ENTRIES

The entries in both appeals are identical and as follows:

1926

Apr. 24—Petition received and filed.
May 3—Copy of petition served on Solicitor.
May 3—Notification of receipt mailed taxpayer.
June 1—Answer filed by Solicitor.
June 24—Copy of answer served on taxpayer—General Calendar.

1927

Sept. 8—Motion to consolidate for hearing with dockets 18679, 18680, 26655-56, 10472, 25275 and 14516 filed by taxpayer. See 18679. Granted.

1928

June 27—Hearing set Sept. 11, 1928.
July 29—Motion for a continuance to Oct. 10, 1928 filed by taxpayer.
July 23—Motion granted.
July 31—Application for order to take depositions filed by taxpayer.
Oct. 9—Motion for a 60 day continuance filed by taxpayer. See 14516.
Oct. 11—Motion for a continuance to Dec. 10, 1928—granted.
Dec. 6—Motion for continuance to Feb. 15, 1929 filed by taxpayer.

1929

Jan. 28—Motion for a continuance to April 15, 1929 filed by taxpayer. Granted to Apr. 15, 1929.
Mar. 22—Motion for a continuance to 5/2/29 filed by taxpayer. 3/25/29 granted.
Apr. 27—Motion to consolidate with 14516 and 42664 and advance hearing of docket 42664 to 5/2/29 filed by taxpayer. See 14516.
Apr. 27—Motion for leave to amend petition filed by taxpayer—amended petition tendered—copy served 5/1.
Apr. 30—Motion for leave to amend petition granted.
May 2—Hearing had before Chas. P. Smith, Division 5, on merits—heard with 10472, 25275, 32170 and 42664.
May 20—Transcript of hearing May 2 and 3, 1929 filed.
July 17—Motion for extension of 30 days from Aug. 1st to file briefs (both parties) filed by General Counsel.
July 19—Motion granted.
Aug. 28—Brief filed by General Counsel.
Aug. 31—Motion for extension of 10 days to file brief filed by taxpayer.
Sept. 10—Requested findings of fact and brief filed by (2) taxpayer.

1930

Jan. 22—Findings of fact and opinion rendered, Mr. Smith, Division 5, judgment will be entered Rule 50.

Feb. 27—Motion for rehearing and modified findings of fact and opinion filed by taxpayer.
Mar. 6—Order denying motion of Feb. 27 for rehearing entered.
Mar. 31—Notice of settlement filed by General Counsel.
Apr. 3—Hearing set April 23, 1930.
Apr. 21—Motion to postpone hearing for 30 days filed by taxpayer. 4/22/30 granted to May 21st.
May 21—Objections to General Counsel's notice of settlement and counter-determination filed by taxpayer.
May 21—Hearing had before Mr. Smith on settlement under Rule 50. Continued to June 18, 1930.
May 21—Order of continuance to June 18, 1930 for hearing on settlement under Rule 50 entered.
May 24—Transcript of hearing of May 21, 1930 filed.
June 18—Hearing had before Mr. Smith, Division 5, proposed redetermination under Rule 50.
July 1—Transcript of hearing of June 18, 1930 filed.
July 15—Order denying motion for rehearing or argument entered.
July 16—Decision entered—C. P. Smith, Division 5.
Sept. 26—Order amending findings of fact promulgated Jan. 22, 1930 entered.

1931

Jan. 6—Petition for review to U. S. Circuit Court of Appeals, 4th Circuit, with assignments of error filed by taxpayer.
Feb. 28—Certified copy of order extending time for 60 days to settle statement and transmit record filed.
Apr. 24—Certified copy of order extending time for 60 days to settle statement and transmit record filed.
July 11—Certified copy of order from U. S. Circuit Court of Appeals (4th) to transmit single record to Court filed.
July 14—Agreed praecipe filed.
July 14—Agreed statement of evidence approved and ordered filed.

(3) Docket No. 42664

Appearances:

For Petitioner:
Camden R. McAtee, Esq.,

For Respondent:
M. E. McDowell, Esq.,
W. F. Gibbs, Esq.,
F. Schlosser, Esq.

Bankers Pocahontas Coal Company,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

DOCKET ENTRIES

1929

Feb. 11—Petition received and filed. Taxpayer notified. (Fee paid)
Feb. 12—Copy of petition served on General Counsel.
Mar. 12—Answer filed by General Counsel.
Mar. 23—Copy of answer served on taxpayer—General Calendar.
Apr. 27—Motion to consolidate for hearing on May 2, 1929 with dockets 14516 and 14517 filed by taxpayer. 4/30/29 granted.
Apr. 27—Motion for leave to amend petition, amendment tendered, filed by taxpayer. See 14516.

After this date the entries are identical with entries in Appeals 14516, 14517 as appearing herein.

PETITION

(4) Filed April 24, 1926.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket No. 14517

Commisioner of Internal Revenue,
Respondent.

The above named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CA:2332-4-60D), dated February 15, 1926, and as the basis of its appeal sets forth the following:

1. The petitioner is a West Virginia Corporation with its principal offices at Welch, West Virginia.

2. The deficiency letter was mailed to taxpayer February 15, 1926.

3. The taxes in controversy are income and profits taxes for the calendar year 1920, and are less than $10,000.00 in amount.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

(a) For the year 1920 in the addition to gross income of items previously reported as taxable income for the (5) year 1919, to-wit: "Royalties—$5434.68" and "Taxes refunded—$180.00".

(b) For the year involved in this appeal in establishing a depletion unit, and in establishing an erroneous depletion unit.

(c) Disallowance of so-called depletion and increase

of income thereby for the year as follows, to wit: 1920—$29,401.36.

(d) Reduction of invested capital by pro-rating dividends for each of the several years as follows, to wit: 1920—$12,630.33.

(e) Adjustment of surplus with reference to invested capital for each of the several years as follows, to wit: 1920—$32,015.22.

5. The facts upon which the petitioner relies as the basis of its appeal are as follows:

(a) Prior to March 1, 1913, the owner of, or owners of, the fee simple title of certain lands in West Virginia containing coal, and which lands were without value except for their coal content, had by written agreements with third parties divested themselves of ownership and control of said coal content and effected a sale of same in place. The purchasers thereof had taken actual and continuous possession of the respective properties, were mining the coal therefrom, and paying to the original owner thereof the considerations provided in said written instruments. Said written instruments were (6) and are in form and substance the same as is shown by specimen copy filed herein as part hereof, marked "Exhibit 2".

(b) In the year 1912 petitioner corporation was duly organized and acquired the fee simple title to the lands aforesaid, which were then and are now without value except for their coal content, and by assignment also acquired the rights and interest of the predecessor owner or owners in the written instruments aforesaid, but did not acquire or obtain title to the coal content of said lands previously sold and disposed of as aforesaid. Since its organization, petitioner has done no business except the receipt of payments provided for in said written instruments to be paid by the parties extracting the coal content from said lands, and the distribution of same to its stockholders.

(c) Petitioner states that since its organization in

1912, it has not been, and is not the owner of any mine or mines nor the lessor thereof, but in fact has been and is the owner of choses in action or contracts from which its entire income is derived.

(d) Petitioner states that its right or claim to collect the payments provided in said written instruments existed unconditionally on March 1, 1913, and was owned and held by petitioner prior to said date and the payments therein provided and received subsequent to March
(7) 1, 1913, and particularly in the calendar years 1919 to 1923, inclusive, do not constitute taxable income to petitioner.

(e) Petitioner states it is consistent with the natural adaptation of mineral property, and particularly of coal in place, that different parties should own the surface and the underlying minerals, and that by conveyance or appropriate written instrument a complete severance of title and separate estates may be and is created, and that same was effected as to the sale of coal in place hereinabove described.

(f) Petitioner states it is not a lessor as defined in regulations of the Bureau of Internal Revenue, and its alleged depletion allowance for the several taxable years has been and is erroneously and illegally computed as though petitioner was and is a lessor; that heretofore, misconceiving its proper status, petitioner reported taxable net income and permitted taxes to be assessed thereon with petitioner considered as a lessor, which was and is erroneous; that, in fact, petitioner in receiving the so-called royalties provided for in the aforesaid written instruments, has only received payments from year to year upon a claim or chose in action existing unconditionally on or before March 1, 1913, and such payments are non-taxable income to petitioner for each of the years when received.

(g) Specifically, in support of its allegations of error
(8) in said deficiency letter, petitioner further says:

(h) That its return of income for the several years has been made upon a cash receipt and disbursement basis, including in each year the income attributable to

same; that its payments under said written instruments are due each month, but do not come to hand until the subsequent month or months; that petitioner included in its 1919 return of income payments due in 1919, but not actually shown upon its books until January and February 1920, in the amount of $5,434.66 and an income tax refund of $180.00, which was likewise not entered on its books until January, 1920; that the adjustment proposed in the deficiency letters of February 12, 1926, and February 15, 1926, including said items in 1920 income, is contrary to established accounting methods of petitioner and causes petitioner to report same a second time as taxable income.

(i) That attempted depletion adjustments and the errors of same, in that petitioner is not a lessor, have been hereinabove fully stated.

(j) That the pro-rating of dividends with consequent adjustment of invested capital for the year 1920 is contrary to law, as determined by this honorable Board.

(k) That adjustments of surplus for said year with consequent effect upon invested capital is erroneous (9) as including income and profits taxes and appreciation incorrectly computed by reason of other errors hereinabove alleged.

II.

In the alternative, but without admitting same is right or proper, petitioner states if its status be determined herein to be that of a lessor subject to depletion allowances in determination of its taxable net income and tax liability, petitioner alleges and charges the depletion unit used in said deficiency letter is erroneous and insufficient in that same is not based upon the true and correct recoverable coal content and value thereof as existing on March 1, 1913; that all seams of coal and their content and quality were not considered in determining said coal content or value; that the alleged original coal used in determining alleged appreciation realized before March 1, 1913, as determined is insufficient and erroneous and is not the true and correct cost to petitioner of the assets considered.

On the hearing of this appeal petitioner will introduce evidence intended to show the alleged depletion unit assigned for petitioner in the computation of its taxable net income was and is erroneous as aforesaid, provided said issue is found to be material to the proper determination of its taxes in this proceeding.

6. The taxpayer in support of its appeal relies upon
(10) the following propositions of law:

(a) The method of accounting regularly employed by taxpayer in keeping its books and clearly reflecting its income is to be followed with respect to the time as to which items of gross income and deductions are to be accounted for.

(b) Property held by taxpayer on March 1, 1913, including claims or choses in action, is capital.

(c) In the case of mines a reasonable allowance for depletion shall be allowed as a deduction from gross income in computing net income.

(d) Invested capital may not be reduced in determining the extent to which a dividend is paid from current earnings of the taxable year by a theoretical tentative tax set aside out of current earnings and pro-rated over such year, because income and profits taxes do not become due and payable, and hence do not accrue, until the following year.

WHEREFORE, the premises considered, petitioner respectfully prays that this Board may hear and determine its appeal.

(s) CAMDEN R. McATEE
Counsel for Petitioner,
Woodward Building,
Washington, D. C.

State of West Virginia,
(11) County of McDowell, ss:

D. J. F. Strother, being duly sworn, says that he is President of the Bankers Pocahontas Coal Company,

above named, and as such is duly authorized to verify the foregoing petition; that he had read the said petition, and is familiar with the statements therein continued and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(s) D. J. F. STROTHER

Subscribed and sworn to before me this 22nd day of April, 1926.

(s) RUBY SLEDGE REYBURN
Notary Public.

My Commission expires Dec. 11, 1934.

Commissioned as Ruby Sledge.

(12) Form NP-2

TREASURY DEPARTMENT

Washington

(COPY)

Feb. 15, 1926.

IT:CA:2332-4-60D

Bankers Pocahontas Coal Co.,
Welch, West Virginia.

Sirs:

The determination of your income and profits tax liability for the year 1920 has been reconsidered in connection with an examination of your books of account and records and a conference held in the Unit January 4, 1926, and a deficiency in the amount of $6,797.56 has been disclosed as shown in the attached statement.

In accordance with the provisions of Section 274 of

the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA: 2332-4-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By (S) C. R. NASH,
Assistant to the Commissioner.

Enclosures:

Statements
Agreement—Form A.
Form 882.

(13) STATEMENT

IT:CA:2332-4. February 15, 1926.

In re: Bankers Pocahontas Coal Company,
Welch, West Virginia.

1920

Deficiency in tax—$6,797.56.

ADJUSTMENTS TO INCOME

Net income reported on return			$10,114.34
Additions:			
1. Royalties, revenue agent's report		$63,706.66	
Royalties, return		58,272.00	5,434.66
2. Taxes refunded, revenue agent's report		$6,040.06	
Taxes refunded		5,860.06	180.00
3. Depletion, return	$45,773.01		
Depletion, revenue agent's report	16,371.65		29,401.36
Total			$45,130.36
Deduction:			
4. Interest Liberty Bonds			222.50
Net income corrected			$44,907.86

EXPLANATION OF ADJUSTMENTS TO NET INCOME

1. Royalties added to 1919 instead of 1920.

2. Taxes refunded in 1920 added to 1919 income.

3. Depletion as computed in the revenue agent's report, a copy of which was furnished you, has been accepted by this office.

4. Interest on Liberty Bonds of $222.50 is exempt.

INVESTED CAPITAL

Capital stock on revenue Agent's report		$150,000.00
Surplus, revenue agent's report		32,015.22
1. Undervaluation of coal lands		134,497.80
		$316,513.02

(14)

Deductions:		
2. Preceding year's tax, 1919 $3,386.04, prorated,	$ 1,427.05	
3. Dividends	7,500.00	
4. Dividends	12,630.33	21,557.38
Invested capital full year		$294,955.64

EXPLANATION OF ADJUSTMENTS TO INVESTED CAPITAL

1. The adjustment of invested capital for undervaluation of coal lands is based on data on file in this office.

2. Federal income taxes are deemed to have been paid out of the net income of a taxable year for which they are levied and, accordingly, may be included in the computation of invested capital only until such taxes become due and payable. The correct tax liability for the preceding taxable year has, therefore, been prorated from the due date in accordance with Article 845, Regulations 45.

3. Dividends paid during the first sixty days of the taxable year are deemed to have been paid from earnings accumulated during preceding years and have, accordingly, been prorated in accordance with Article 858, Regulations 45.

4. Dividends paid after the expiration of the first sixty days of the taxable year will be deemed to be paid out of the net income available for such purpose on the date when it is payable in accordance with Articles 857 and 858, Regulations 62.

DEDUCTION FOR DIVIDENDS

Available earnings for year		44,907.86
Tentative tax for year		7,296.95
Amount available for dividends		$37,610.91
Dividends paid March 31,		$ 7,500.00
Earnings for ninety days		$ 9,248.58
Dividends paid May 10		$22,500.00
Earnings for forty days	$4,110.48	
Plus	1,748.58	5,859.06
Paid from surplus		$16,640.94
Prorated for 236 days		$10,730.22

(15)

Dividends paid June 30	$,9000.00
Earnings for fifty-one days	5,240.86
Paid from surplus	$3,759.14
Prorated for 185 days	$1,900.11

Computation of Tax.

Invested capital	$294,955.64
Excess profits credit	$ 26,596.45
Excess profits tax	$ 3,662.28
Total profits tax	$ 3,662.28

Net income		$44,907.86	
Less: Profits tax	$3,662.28		
Exemption	2,000.00	5,682.28	
Balance taxable at 10%		$39,245.58	
Amount of tax at 10%			$3,924.56
Total tax assessable			$7,586.84
Original tax			$ 789.28
Deficiency in Tax			$6,797.56

Cletus Lease Exhibit omitted because same appears in Board's Findings.

ANSWER

(16) Filed June 1, 1926.

UNITED STATES BOARD OF TAX APPEALS

In re: Appeal of Bankers Pocahontas Coal Co., Welch, West Virginia

Docket No. 14517

Comes now the Commissioner of Internal Revenue, by his attorney A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the statements contained in paragraph 1 of the petition.

2. Admits the statements contained in paragraph 2 of the petition.

3. Admits the statements contained in paragraph 3 of the petition.

4. Denies that the determination of the Commissioner contains errors; and more particularly, that it contains those errors, specified in paragraph 4, subdivisions (a) to (e) inclusive.

5.(a) Admits that prior to March, 1, 1913 certain owners of the fee simple title of certain lands in West Virginia containing coal, had entered into written agreements of the character shown in taxpayer's Exhibit 2 and more particularly described as the "Cletus Lease"; but denies that said lands were without value except for their coal contents and denies further that the owners (17) of said lands had by said written contract divested themselves of ownership and control of said coal content and had effected a sale of the coal in place.

(b) Admits that the taxpayer corporation was organized in 1912; that it acquired the fee simple title to certain lands aforementioned; that by assignment it also acquired the rights and interest of the predecessor owner or owners in the written instruments aforementioned; but denies that said lands were without value except for their coal contents; denies that the taxpayer did not acquire or obtain title to the coal content of said lands; and denies that since its organization petitioner has done no business except to receive payments provided for in said written instruments and to distribute the same to its stockholders.

(c) Denies the statements contained in paragraph 5, subdivision (c) of the petition.

(d) Denies the statements contained in paragraph 5, subdivision (d) of the petition.

(e) Admits the statements contained in paragraph 5, subdivision (e) of the petition, except it is denied that the contracts here in question effected a sale of coal in place on the lands covered by said contracts heretofore mentioned.

(f) Denies the statements contained in paragraph 5, subdivision (f) except it is admitted that the taxpayer reported income and permitted certain Federal income (18) and profits taxes thereon to be computed upon the basis that it was a lessor of coal lands.

(h) Admits that the taxpayer returned its income upon the cash receipts and disbursements basis; that

it included in income for the year 1919 the amounts of $5,434.66 and refund of taxes of $180.00, which items were not entered on the taxpayer's books until January 1920; and admits that the Commissioner has included both of these items in income for 1920 rather than as income for 1919; but denies that that action is contrary to established accounting methods or that it requires the taxpayer to report the same the second time as taxable income.

(i) Admits that the depletion adjustments and the alleged errors thereon have, to a certain extent, been set out above but denies the conclusion that the petitioner is not a lessor.

(j) Denies the statements contained in paragraph 5, subdivision (j) of the petition.

(k) Denies the statements contained in paragraph 5, subdivision (k) of the petition.

II.

Denies that the depletion unit used by the Commissioner in the deficiency letter is erroneous or that its use results in the allowance of insufficient depletion.

Denies further that the recoverable coal content and value thereof as existing on March 1, 1913 were not (19) correctly determined by the Commissioner or that the Commissioner's determination thereof did not consider all seams of coal and their content and quality as of March 1, 1913.

WHEREFORE, it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

WARD LOVELESS, Special Attorney.
Bureau of Internal Revenue.

WL/mvb

AMENDED PETITION

(20) Filed April 30, 1929.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket No. 14516 14517 42664

Commissioner of Internal Revenue,
Respondent.

For amended petition herein, petitioner, Bankers Pocahontas Coal Company, respectfully states as follows:

1. That heretofore for the calendar years 1914 to 1919, inclusive, the respondent, Commissioner of Internal Revenue, did assess against petitioner additional income taxes under the several Revenue Acts applicable to said years and each of them, and did require petitioner to pay the amount of said additional assessment to wit: $6,267.08, to Albert B. White, Collector of Internal Revenue at Parkersburg, West Virginia, which payment was made by petitioner under protest on August 17, 1921; that in the computation of said additional taxes, which were income and profits taxes, the respondent Commissioner of Internal Revenue, did compute the depletion unit allowable to the petitioner in each of said several years to be .036¢ per ton of coal produced.

2. That thereafter on or about February 15, 1923,
(21) petitioner after filing a claim for refund of said taxes, and having same rejected, instituted its action at law in the United States District Court for the Northern District of West Virginia to recover from said Albert B. White, Collector, the aforesaid amount of $6,267.08 of taxes as being illegally and erroneously collected, which action was thereafter by consent of the parties, transferred to the District Court for the Southern District of West Virginia, and in said Court proceeded to hearing and final judgment; that in said action the deple-

tion unit allowable under the several Revenue Acts to petitioner in the computation of the taxable net income, was put in issue and was litigated between the parties and said cause was submitted to the Court for its judgment upon an agreed statement of facts, including evidence as to said depletion unit and its proper amount; that thereafter, said Court being advised, gave its opinion that said depletion unit, which respondent had computed to be $.036 was erroneous and a depletion unit of $.05 for each of said years was allowable to petitioner in the computation of its taxes in controversy; that pursuant to said opinion the judgment of the Court was duly entered, awarding a recovery from the defendant, Albert B. White, Collector, in favor of petitioner of taxes (22) erroneously collected in the amount of $5,373.01 principal, interest and costs, and in the computation thereof the depletion unit, or capital value, existing on March 1, 1913 and to be excluded from gross income in the computation of taxable net income for the several years, was computed at $.05 per ton of coal produced and not at $.036 per ton as originally determined by respondent Commissioner; that said judgment was thereafter duly paid to petitioner as plaintiff in said action by the United States, and no appeal therefrom was taken, and said judgment has been and remains in full force and effect.

3. That in the action aforesaid, and herein, the parties are identical, being petitioner as plaintiff suing in its own right, and the United States as defendant, represented respectively by its Collector of Internal Revenue, and by the respondent, Commissioner of Internal Revenue; that said action was defended for the United States by the United States District Attorney, and by Robert A. Littleton, Special Attorney from the Office of the General Counsel of the Commissioner of Internal Revenue, which was known at said time as the Solicitor's office, as attorneys of record and the details of defense and satisfaction of said judgment were handled by said Special Attorney, or attorneys representing the respondent herein. That said Court had jurisdiction over the (23) parties and subject matter of said action, and that the depletion unit allowable to petitioner in the years in controversy in said action, being the capital value existing in the coal content of petitioner's property as of March 1, 1913, was and is the same subject

matter in controversy herein with respect to said depletion unit, and that said depletion unit was and is determined between the parties in the aforesaid action, and by the judgment of the Court entered therein.

That said judgment of the United States District Court for the Southern District of West Virginia, entered and in effect as aforesaid, was given upon the same cause of action concerning the depletion unit as aforesaid and now sought to be litigated herein, and petitioner pleads and relies upon the said judgment and the proceedings in the aforesaid action as res adjudicata as to the depletion unit herein; that under the provisions of Article 4, Section 1 of the Constitution of the United States, full faith and credit must be given in this proceeding to said judgment and judicial proceedings of said United States District Court existing as aforesaid.

4. And petitioner further states that at the hearing of this appeal, profert will be made of the record and
(24) judgment aforesaid, in support of the allegations of this amended petition.

WHEREFORE, petitioner prays as in its original petition and for all other proper relief to which it may be entitled.

(s) CAMDEN R. McATEE,
Counsel for Petitioner.

State of West Virginia,
(25) County of McDowell, ss:

D. J. F. Strother, being duly sworn, deposes and says that he is president of the Bankers Pocahontas Coal Company, a corporation, and authorized to make this affidavit; that he is familiar with the statements in the amended petition, and same are true as he verily believes.

(s) D. J. F. STROTHER.

Subscribed and sworn to before me this 20th day of April, 1929.

(s) RUBY SLEDGE REYBURN.
(Seal) Notary Public.

Commissioned as Ruby Sledge.

Commission expires Dec. 11, 1934.

(26) **STATEMENT**

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket No. 14516.

Commissioner of Internal Revenue,
Respondent.

The petition, amended petition, answer and Cletus Lease Exhibit herein are identical in substance with same in Appeal 14517, as affecting adjustments and deficiencies herein contested for the calendar years 1921, 1922 and 1923, excepting as to special incidental issues removed from controversy by the subsequent Board findings and opinion, and same are therefore here omitted, excepting the deficiency letter, which is as follows:

COPY

(27) Docket #14516

Form-NP-2

TREASURY DEPARTMENT

Washington

February 12, 1926.

IT:CA:2332-4-60D

Bankers Pocahontas Coal Company,
Welch, West Virginia.

Sirs:

The determination of your income and profits tax liablity for the years 1921, 1922 and 1923, has been reconsidered in connection with an examination of the books of account and records for 1921 and with the returns filed for 1922 and 1923, and a conference held in the Unit January 4, 1926, and a deficiency in the amount of $16,134.55, has been disclosed, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given on opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: CA:2332-4-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR
Commissioner
By C. R. NASH
Assistant to the Commissioner.

Inclosures:
Statements
Agreement—Form A
Form 882.

(28) STATEMENT

February 12, 1926.

IT:CA:2332-4-60D

In re: Bankers Pocahontas Coal Company, Welch, West Virginia.

	Deficiency in Tax
1921	$7,871.64
1922	4,149.24
1923	4,113.67
Total	$16,134.55

1921

ADJUSTMENTS TO INCOME

Net income reported on return		$8,989.53
Additions:		
1. Depletion return	$50,000.00	
Depletion, revenue agent's report	11,966.69	$38,033.31
Corrected net income		47,022.84

EXPLANATION OF ADJUSTMENT TO NET INCOME

1. See Explanation #3, Adjustments to Net Income for 1920.

INVESTED CAPITAL

Capital Stock, revenue agent's report	$150,000.00
Surplus, revenue agent's report	24,443.65
(1) Undervaluation of coal lands	132,586.41
Total	**$307,030.06**

Deductions:

(2) Preceding year's tax, 1920 $7,586.84 prorated	$3,206.20	
(3) Dividends	9,000.00	
(4) Dividends	13,170.90	25,377.10
Invested capital		$281,652.96

EXPLANATION OF ADJUSTMENTS TO INVESTED CAPITAL (29)

(1) See Explanation (1) of Adjustments to Invested Capital for 1920.

(2) See Explanation (2) of Adjustments to Invested Capital for 1920.

(3) See Explanation (3) of Adjustments to Invested Capital for 1920.

(4) Dividends paid after the expiration of the first sixty days in the taxable year will be deemed to be paid out of the net income available for such purpose on the date when it is payable, in accordance with Articles 857 and 858, Regulations 62.

DEDUCTIONS FOR DIVIDENDS

Available earnings for year		$47,022.84
Tentative tax for year		8,251.34
Amount available for dividends		$38,771.50
Dividends paid April 18		22,500.00
Earnings for 17 days	$1,805.74	
Plus	2,059.80	3,865.54
Paid from surplus		$18,634.46
Prorated for 258 days		13,170.90

COMPUTATION OF TAX

Invested Capital		$281,652.96
Excess profits credit		25,532.24
Excess profits tax		4,298.12
Profits tax		$ 4,298.12
Net income	$47,022.84	
Less:		
Profits tax	4,298.12	
Balance subject to 10% tax	$42,724.72	
Amount of tax at 10%		4,272.47
Total tax assessable		$8,570.59
Original tax		698.95
Deficiency		$7,871.64

(30) 1922

ADJUSTMENTS TO INCOME

Net income reported		$28,753.21
Additions:		
1. Depletion, return	$50,000.00	
Depletion allowable	16,806.09	33,193.91
Corrected net income		$61,974.12

EXPLANATION OF ADJUSTMENT TO NET INCOME

1. Depletion has been allowed in accordance with the data on file in this office.

COMPUTATION OF TAX

Net income	$61,947.12	
Balance subject to tax at 12½%	61,947.12	
Amount of tax at 12½%		$7,743.39
Total tax assessable		7,743.39
Original tax		3,594.15
Deficiency		$4,149.24

1923

ADJUSTMENTS TO INCOME

Net income reported on return		$25,747.11
Additions:		
1. Depletion, return	$50,000.00	
Depletion allowable	17,090.60	$32,909.40
Corrected net income		$58,656.51

EXPLANATION OF ADJUSTMENTS TO NET INCOME

1. See Explanation (1), Adjustments to Net Income for 1922.

(31) COMPUTATION OF TAX

Net income	$58,656.51	
Balance taxable at 12½%	58,656.51	
Amount of tax at 12½%	7,332.06	
Total tax assessable		$7,332.06
Original tax		3,218.39
Deficiency		$4,113.67

You are advised that the additional information submitted under date of January 22, 1926, has been given consideration in the adjustments as shown herein.

(32) **STATEMENT**

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

v. Docket No. 42664.

Commissioner of Internal Revenue,
Respondent.

The petition, amended petition and answer herein are identical in substance with same in Appeal 14517, as affecting adjustments and deficiencies herein contested for the calendar years 1924, 1925 and 1926, and same are therefore here omitted, excepting Paragraph (h) thereof and the deficiency letter here appearing:

(h) That its return of income for the several years has been made upon a cash receipt and disbursement basis, including in each year the income attributable to same; that its payments under said written instruments are due each month, but do not come to hand until the subsequent month or months; that petitioner included in (33) its 1919 return of income payments due in 1919, but not actually shown upon its books until January and February, 1920, in the amount of $5,434.66 and an income tax refund of $180.00, which was likewise not entered on its books until January, 1920; that the adjustment proposed in the deficiency letters of February 12, 1926, and February 15, 1926, including said items in 1920 income, is contrary to established accounting methods of petitioner and causes petitioner to report same a second time as taxable income.

(34) COPY

Docket No. 42664
NP-2
MAILED
Jan. 15, 1929

IT:AR:C
JHP-60D

Bankers Pocahontas Coal Company,
Welch, West Virginia.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $16,919.88, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Deputy Commissioner.

Enclosures:
Statement
Form 866
Form 882
Schedules 1 to 6, inclusive
eco-3

IT:AR:C
JHP-60D

STATEMENT OF RETURNS EXAMINED

(35) AND

RESULTING TAX LIABILITY

Company	Year	Form	Date Filed
Bankers Pocahontas Coal Company	1924	1120	March 14, 1925
	1925	1120	Tentative March 15, 1926 Final May 15, 1926
	1926	1120	Tentative March 15, 1927 Final May 12, 1927

TAX LIABILITY

Company	Year	Deficiency
Bankers Pocahontas Coal Company	1924	$3,362.17
	1925	6,419.04
	1926	7,138.67
Total		$16,919.88

This audit is based upon Revenue Agent's report for the years 1924, 1925 and 1926 which upon review has been approved by this office except as to adjustments for allowable depletion.

Careful consideration has been given to the contention set forth in your protest, sworn to December 10, 1927, filed with the Internal Revenue Agent in Charge, Huntington, West Virginia, and to the additional information submitted in your brief dated November 9, 1928 and at a conference held in Washington, D. C., on December 12, 1928.

It is held by this office that, for income tax purposes, the damages in the amount of $3,770.40 received from the Flanagan Coal Company in 1924 have the status of royalties received, accordingly depletion has been allowed on the 15,000 tons estimated to have been damaged.

No adjustment is deemed to be necessary in regard to curtailment of notes receivable due from Welch Armature Company since such amount was not included in your taxable income.

Inasmuch as dividends were not deducted from gross income no adjustment is necessary for this item.

Your total tax liability for the years involved amounts to $20,478.05 as shown on the attached Agreement Form 866.

eco-3

(36) Bankers Pocahontas Coal Company Year ended December 31, 1924.

Schedule 1

Net Income

Net income as disclosed by return		$28,465.36
As corrected		55,362.70
Net adjustment		$26,897.34
Unallowable deductions and additional income:		
(a) Excessive depletion	$26,926.07	
Total		26,926.07
Nontaxable income and additional deductions:		
(b) Additional miscellaneous expense	$ 25.96	
(c) Nontaxable interest on Liberty Bonds	2.77	
Total		28.73
Net adjustment as above		$26,897.34

Schedule 1-A

Explanation of Items Changed

(a) Based on the terms of the leases in effect on March 1, 1913, the recoverable tonnages and productions, the following computations of values are in conformity with the regulations and are used instead of the $.036 originally allowed.

eco-3

Bankers Pocahontas Coal Company Year ended
(37) December 31, 1924.

Schedule 1-a (Continued.)

Explanation of Items Changed (Continued)

Depletion Schedule—Year ended December 31, 1924.

Companies from which royalties were received.	Production	Rate	Depletion Allowed
Fall River Pocahontas Coal Company*	15,000	.0255	$ 382.50
	94,296	.0255	2,404.55
Superior Pocahontas Coal Company	120,000	.0298	3,576.00
Monarch Smokeless Coal Company**	162,452	.0208	3,379.00
Kingston Pocahontas Coal Company (Oregon and Exeter leases)	444,125	.0298	13,234.92
Fordson Coal Company	16,981	.00571	96.96
Total			$23,073.93
Depletion claimed			50,000.00
Excessive depletion			$26,926.07

*Coal mined by Flanagan Coal Company from this lease.

**Includes production of New Pocahontas Coal Company.

(b) and (c) Self explanatory.

Schedule 2.

Computation of Tax

Net income for taxable year	$55,362.70
Income tax 12½%	6,920.34
Tax previously assessed	$3,558.17
Additional tax to be assessed	$3,362.17

eco-3

(38) Bankers Pocahontas Coal Company Year ended December 31, 1925.

Schedule 3

Net Income

Net loss as disclosed by return		($3,467.07)
As corrected		49,377.26
Net adjustment		$52,844.33
Unallowable deductions and additional income:		
(a) Haulage over right of way	$ 30.29	
(b) Royalties received	75,250.32	
(c) Taxes collected from lessees	14,031.61	
(d) Rent and office expense	198.10	
(e) Depreciation	14.27	
(f) Printing and stationery	257.10	
Total		$89,781.69
Nontaxable income and dditional deductions:		
(g) Taxes	$13,931.59	
(h) Rents	350.81	
(i) Traveling expenses	444.11	
(j) General expense	5.20	
(k) Depletion	22,205.65	
Total		$36,937.36
Net adjustment as above		$52,844.33

Schedule 3-A

Explanation of Items Changed

(a), (d), (e), (f), (h), (i) and (j) income and expense adjustments have been made to bring the return in agreement with amounts disclosed by books.

(b) The Bureau holds that the royalties received constitute gross income and that such action is in accord with Treasury Decision 3562.

(c) and (g) Taxes paid for your company by the leases is deemed to be income to your company. However, such taxes have been allowed as deductions from your gross income.

(k) See explanation A—Schedule 1-A.

eco-3

(39) Bankers Pocahontas Coal Company Year ended December 31, 1925.

Schedule 3-a (Continued)

Explanation of Items Changed.

(k) Depletion Schedule—Year ended December 31, 1925.

Companies from which royalties were received	Production	Rate	Depletion Allowed
Fall River Pocahontas Coal Company	84,141	.0255	$2,145.59
Superior Pocahontas Coal Company	120,000	.0298	3,576.00
Monarch Smokeless Coal Company	147,184	.0208	3,061.43
Kingston Pocahontas Coal Company (Oregon and Exeter Leases)	447,444	.0298	13,333.83
Fordson Coal Company	15,551	.00571	88.80
Total			$22,205.65

Schedule 4

Computation of Tax

Net income for taxable year	$49,377.26
Income tax 13 per cent	$ 6,419.04
Tax previously assessed	None
Tax to be assessed	$ 6,419.04

eco-3

Bankers Pocahontas Coal Company Year ended
(40) December 31, 1926.

Schedule 5

Net Income

Net income as disclosed by return		($3,476.41)
As corrected		52,879.06
Net adjustment		$56,355.47
Unallowable deductions and additional income:		
(a) Haulage over right of way	$ 233.42	
(b) Royalties received	79,761.09	
(c) Water Rent—McClaren and Summers	27.00	
(d) Rent—Appalachian Power Company	350.81	
(e) Taxes collected from lessees	13,779.03	
(f) Depreciation	14.27	
(g) General Expense	147.60	
Total		$94,313.22
Nontaxable income and additional deductions:		
(h) Rent and office expense	$ 24.60	
(i) Taxes	13,939.82	
(j) Depletion	23,993.33	
Total		$37,957.75
Net adjustment as above		$56,355.47

eco-3

Bankers Pocahontas Coal Company Year ended
(41) December 31, 1926.

Schedule 5-a

Explanation of Items Changed

(a), (c), (d), (f), (g) and (h) Income and expense accounts have been adjusted to agree with amounts disclosed by books.

(b) See explanation (b) Schedule 3-a.

(e) and (i) See explanation (c) and (g) Schedule 3-a.

(j) See explanation (a) Schedule 1-a.

Depreciation Schedule. Year ended Dec. 31, 1926.

Companies from which royalties were received	Production	Rate	Depletion Allowed
Fall River Pocahontas Coal Company	88,073	.0255	$2,245.86
Superior Pocahontas Coal Company	120,000	.0298	3,576.00
Monarch Smokeless Coal Company	167,030	.0208	3,474.22
Kingston Pocahontas Coal Company (Oregon and Exeter Leases)	483,529	.0298	14,409.16
Fordson Coal Company	50,453	.00571	288.09
Total			$23,993.33

Schedule 6

Computation of Tax

Income Tax

Net income for taxable year	$52,879.06
Income tax 13½%	7,138.67
Total previously assessed	None
Tax to be assessed	$ 7,138.67

MOTION FOR CONSOLIDATION

(42) Filed Apr. 27, 1929.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket No. 42664.

Commissioner of Internal Revenue,
Respondent.

Petitioner, by counsel, moves the Board:

1. To advance and consolidate this appeal for hearing with appeals of petitioner Nos. 14516 and 14517 now set for hearing on Thursday, May 2, 1929,

For cause:

That same presents the same issues as the earlier appeals.

That respondent, (Mr. McDowell) has no objection.

(Signed) CAMDEN R. McATEE,
Counsel for Petitioner.

GRANTED
APRIL 30, 1929
(Sgd.) B. H. Littleton
Member,
U. S. BOARD OF TAX APPEALS

FINDINGS OF FACT AND OPINION.

(43) 18 B. T. A. ---------.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Co.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 10472, 14516, 14517, 25275, 32170, 42664. Promulgated January 22, 1930.

Royalties received under leases of coal lands are held to constitute gross income and not proceeds from the sale of coal in place.

Money received in compromise of a suit to recover the value of coal extracted by a trespasser, plus damages to the property held, on the record, to constitute taxable income.

Proper depletion rate per ton of coal mined determined.

Camden R. McAtee, Esq., and Wells Goodykoontz, Esq., for the petitioners. M. E. McDowell, Esq., and Frank B. Schlosser, Esq., for the respondent.

These proceedings, consolidated for hearing and de-
(44) cision, involve deficiencies as follows:

Docket No.		
14517	1920	$6,797.56
14516	1921	7,871.64
	1922	4,149.24
	1923	4,113.67
42664	1924	3,362.17
	1925	6,419.04
	1926	7,138.67
10472	1919	863.62
	1920	1,181.02
	1921	1,123.48
25275	1922	2,549.05
	1923	1,817.77
32170	1924	95.09
	1925	1,144.47

In the petitions of Bankers Pocahontas Coal Co. (Docket Nos. 14517, 14516, and 42664), the first contention made is that there is no tax due, upon the ground that the amounts received by the petitioner during the taxable years represented installment payments upon the sales of coal in place, which coal had been sold prior to March 1, 1913.

The second contention is that if the Bankers Pocahontas Coal Co. is to be considered as a lessor, then the amount of depletion which has been allowed to that company has been erroneously computed by the respondent.

For the year 1920, there are two incidental questions which simply amount to the inclusion in 1920 of income which was previously reported for 1919. For 1924, there is an incidental question arising by reason of damages received by the petitioner, the contention being that the (45) amount received as damages to property is not properly includable in gross income.

The contentions in the petitions of D. J. F. Strother (Docket Nos. 10472, 25275, and 32170) are:

(1) That the petitioner received no taxable income when he received distributions from Bankers Pocahontas Coal Co., claimed by the petitioner to be tax-exempt by

reason of being distributions of a part of the capital of that company;

(2) That the depreciation rate properly allowable to the Bankers Pocahontas Coal Co., if not properly allowed, has distorted his income;

(3) That the Bankers Pocahontas Coal Co., has made distribution each year of all of its revenues derived from its contracts; that it has accordingly distributed its depletion reserve and that the petitioner should be entitled to an allowance for that depletion reserve in the computation of dividends received from it.

FINDINGS OF FACT

In July, 1912, the Bankers Pocahontas Coal Co., a West Virginia corporation (hereinafter sometimes called the corporation), acquired the fee simple title to approximately 6,200 acres of coal lands, including both the surface and the mineral rights in the State of West Virginia. The land had no appreciable value except for the coal (46) content.

Upon incorporation in 1912, the corporation acquired by formal assignment and has continued to retain the beneficial interest of the original owners in certain contracts affecting the coal content which were executed in 1901 and 1902 with various operating companies and to which contracts the 6,200 acres and coal content were subject.

These contracts were originally prepared by D. J. F. Strother, who at that time was attorney, director, and stockholder in the predecessor corporations. The form of the contracts is that prevailing in the West Virginia coal fields, which followed the Pennsylvania form of contracts as introduced by Pennsylvanians who were largely instrumental in the early coal development in the West Virginia field.

By agreement of parties a copy of such contracts was offered and received in evidence as typical of the several

contracts existing on the acreage acquired by the corporation in 1912. The specimen contract provides in part as follows:

This contract of lease, made this 17th day of June, 1901, between the Tug River Coal Land Company, a corporation, authorized and doing business under and by virtue of the laws of the State of West Virginia, party of the first part, hereinafter called the Lessor, and the Cletus Coal and Coke Company, a like corporation, hereinafter called the Lessees.

Witnesseth: First: That in consideration of the terms, conditions and stipulations hereinafter set forth to be performed and observed by the lessees, the Lessor doth demise, let and lease for coal mining and coal cokeing purposes only, to the lessee, for the period of thirty (30) years, from the 1st day of January, 1901, a certain tract of land situate, lying and being in the County of McDowell and State of West Virginia, on the waters of Tug River containing eight hundred acres, more or less (47) and bounded and described as follows: (Description omitted.)

The Lessor covenants to and with the said Lessee that it has good right and title to said land, and that the said Lessee shall have quiet, and peaceable enjoyment of the same during the continuance of this lease.

SECOND: The Lessees shall have the sole and exclusive privilege of mining and coking coal on the above described premises and of conducting a general mercantile business thereon during the continuance of this lease, and the privilege of using so much of the surface of said land and so much of the timber, stone, sand, clay and water as may be necessary for the mining, coking and building purposes of said Lessees, but for no other purpose.

* * * * * * *

THIRD: In consideration thereof, the Lessees hereby covenant and agree to pay to the Lessor, its successors and assigns, during the continuance of this lease, as rental for the said premises, the following royalties, to-wit:

Ten (10) cents per ton for each and every ton of 2240 pounds of coal mined, dug, carried away from or sold or used on the said premises for any other purpose than the manufacture of coke; and fifteen (15) cents for each and every ton of 2240 pounds of coke manufactured upon the said premises, and sold thereon or therefrom. * * *

* * * * * * * *

SEVENTH: The Lessees agree and bind themselves to pay to the Lessors the sum of three thousand dollars for the first year, dating from the 1st day of November, 1901, and the sum of five thousand dollars for each and every year thereafter, during the continuance of this lease, as a minimum rental or royalty for the property herein demised, whether the quantity of coal mined and coke manufactured shall produce that amount of royalty or not, but the Lessees shall have the privilege of mining the next succeeding year, free of royalty, a sufficient amount of coal above the amount necessary to produce the minimum royalty for that year to reimburse themselves for the deficiency in the preceding year. * * *

* * * * * * * *

NINTH: The Lessees agree to pay all the taxes that (48) may be assessed against the demised property and the improvements thereon, or upon the coal mined or coke manufactured, during the continuance of this lease, all other assessments by operation of law whatsoever, when and as the same may become due.

* * * * * * * *

ELEVENTH: At the termination of this lease, otherwise than by forfeiture, all the improvements placed upon the said surface of the demised premises, by the Lessees, shall be valued by two disinterested persons, one to be chosen by each of the parties hereto, and in case of their disagreement, these two shall choose a third, and the persons thus chosen shall value said improvements, and the Lessor shall have the privilege of purchasing said improvements at such valuation, within thirty (30) days after notice thereof. If the Lessor shall not, within said thirty days, accept said improvements, at such valuation, the Lessees shall have the privilege

of removing the same from the leased premises within the period of ninety days from the expiration of said thirty days.

TWELFTH: The Lessees shall have the right to at the expiration of the said thirty years, renew this lease, with the terms, stipulations and agreements as herein set forth, provided that they shall have complied with and performed all the conditions, covenants, agreements and stipulations to be by them complied with or performed.

THIRTEENTH: It is hereby mutually understood and agreed that the covenants, agreements, stipulations herein contained to be performed by the one party or the other, shall be binding on the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed in their corporate names by their respective presidents, and their corporate seals to be hereunto affixed as of the day and year first above written.

All of these agreements were in the main, with the exception as to minor and non-essential provisions, the (49) same as the sample agreement set forth above as the Cletus lease.

From time to time these agreements were reassigned by the lessees to new and different operating lessees, largely with the permission of the lessor corporation.

The cost to the corporation of the properties acquired by it was between $407,000 and $507,000.

The contracts on the property on March 1, 1913, are shown by the following:

SCHEDULE 1

CONTRACTS ON MARCH 1, 1913.

Lessee at 3/1/13	Approximate Acreage	Royalty per ton	Minimum Royalty per annum
Lease #1 Vaughan Coal & Coke Co.	1000	8c	$5,000
#2 Superior Pocahontas Coal Co.	1200	10c	5,000
#3 New Pocahontas Coal Co.	1300	7c	4,000
#4 Oregon Coal & Coke Co.	2000	10c	10,000
#5 Pocahontas Smokeless Coal Co.	600	5c	None
#6 J. B. B. Coal Co.	100	1c(haulage)	300

The estimated recoverable tonnage on March 1, 1913,
(50) is shown by the following:

SCHEDULE 2

ESTIMATED RECOVERABLE TONNAGE ON MARCH 1, 1913

Lease #1 Vaughan Coal & Coke Co.	2,416,452	
Lease #2 Superior Pocahontas Coal Co.	2,309,444	
Lease #3 New Pocahontas Coal & Coke Co.	3,773,835	
Lease #4 Oregon Coal & Coke Co.	4,906,902	upper or Welch Seam
	22,765,666	lower seam
Lease #5 Pocahontas Smokeless Coal Co.	493,172	
Lease #6 J. B. B. Coal Co.	943,171	
Total	37,608,642	

The tonnage mined and royalty receipts of the corporation for the years 1913 to 1919, inclusive, is shown by leases as follows:

	Tonnage mined	Royalty Receipts
Lease No. 1	393,379	34,497.20
Lease No. 2	528,255	61,263.41
Lease No. 3	571,502	52,352.49
Lease No. 4	472,980	77,465.45
Lease No. 5	250,601	11,874.92
Lease No. 6	664,991	6,641.15
Total	2,881,708	244,094.62

The tonnage mined, the tonnage paid for, and the royalty receipts for the taxable years involved in these pro-
(51) ceedings are shown by the following:

Lease No. 1—Fall River Pocahontas Collieries Co.

Year	Tonnage mined	Paid for	Receipts
1920	71,594	71,593	5,727.48
1921	98,587	98,587	7,886.98
1922	85,132	85,132	6,810.55
1923	81,373	81,373	6,509.88
1924	95,859	85,859	7,668.72
1925	81,552	81,557	6,524.16
1926	90,764	90,765	7,261.12

Lease No. 2—Superior Pocahontas Coal Co.—Cletus Mine

Year	Tonnage mined	Paid for	Receipts
1920	57,189	120,000	12,000
1921	54,660	120,000	12,000
1922	55,864	120,000	12,000
1923	51,422	120,000	12,000
1924	57,928	120,000	12,000
1925	68,804	120,000	12,000
1926	90,029	120,000	12,000

Lease No. 3—W. E. Deegans (Later New Pocahontas Coal Co. and Monarch Smokeless Coal Co.)

Year	Tonnage mined	Paid for	Royalty rate	Receipts
1920	113,086	113,686	.07	8,372.78
1921	92,983	104,695	.07	7,916.02
1922	141,895	141,895	.07	7,328.66
1923	131,961	131,961	.08	10,556.83
1924	160,428	160,440	.08	12,835.26
1925	151,694	151,619	.08	12,135.57
1926	166,280	164,533	.08	13,162.70

Lease No. 4—Oregon Coal Company (Later Solvay Collieries Company and Kingston Pocahontas Coal
(52) Company).

WARWICK MINE

Year	Tonnage mined	Paid for	Receipts
1920	86,918	100,000	10,000.00
1921	15,297	100,000	10,000.00
1922	109,853	100,002	10,000.02
1923	113,565	113,659	11,365.72
1924	125,811	125,811	12,581.10
1925	91,170	100,000	10,000.00
1926	118,273	118,827	11,827.70

Lease No. 4—Solvay Collieries Company (Later Kingston Pocahontas Coal Co.)

EXETER MINE

Year	Tonnage mined	Paid for	Receipts
1920	19,231	187,500	18,750.00
1921	25,024	306,250	30,625.00
1922	45,483	370,433	37,043.38
1923	74,152	340,782	34,078.20
1924	103,877	343,657	34,365.70
1925	117,792	325,000	32,500.00
1926	153,717	335,115	33,511.56

Lease No. 5—Pocahontas Smokeless Coal Company (Later Central Pocahontas Coal Company.)

Year	Tonnage mined	Paid for	Receipts
1920	27,671	25,758	1,287.88
1921	5,622	4,111	205.57
1922	8,611	8,773	438.65
1923 (Jan.1-Mch.31)	3,877	3,877	193.85

(53) Lease No. 6—Hensley Coal Company (Later known successively as J. B. B. Coal Company, Dexear Pocahontas Coal Company and Fordson Coal Co.) The payment of 1c per ton ($300.00) minimum per year, is a haulage fee for use of an easement over Bankers Pocahontas property to coal mined on other properties by the operators.

Year	Tonnage mined	Paid for	Receipts
1920	80,506	80,506	805.06
1921	38,990	6,827	68.27
1922	19,811	-----	-----
1923	20,811	15,771	157.71
1924	12,025	12,025	120.25
1925	12,640	12,640	126.40
1926	7,258	51,822	518.22

In the several taxable years in controversy the corporation was upon a cash receipts and disbursements basis of accounting and its income, except minor items not in controversy, consisted of payments received under the several contracts from the various operating companies, and income and profits-tax returns were filed for each of the taxable years and thereafter audited by the Commissioner resulting in the deficiency notice forming the basis of the present proceedings.

In computing the deficiencies the Commissioner considered the relation of the corporation and the operating companies to be that of lessor and lessee and allowed the corporation a depletion deduction of $0.036 per ton

mined for the years 1920 to 1926, inclusive, the same depletion rate as was allowed by the Commissioner for 1919 and prior years.

For prior years 1914 to 1919, inclusive, the Commissioner proposed additional taxes in the amount of $6,267.08 and required the corporation to pay same, which (54) thereafter brought an action on February 17, 1923, in the United States Court for the Southern District of West Virginia against the collector to recover same on the grounds that payments under said contracts received by the corporation were the proceeds of a sale of coal in place consummated before March 1, 1913, or of choses in action existing on said date, or that petitioner plaintiff, as a lessor, was entitled to a unit depletion rate of not less than $0.05 per ton mined in the computation of net taxable income, and consequently said taxes were erroneously and illegally assessed and collected. The issues were made in said action, and same were submitted for judgment upon the evidence adduced by the parties, and were decided by opinion of the court and judgment entered thereon that petitioner plaintiff in the computation of said taxes was entitled to a depletion unit of $0.05 per ton instead of $0.036 computed by the Commissioner. A recovery of $5,373.01 from said collector by petitioner plaintiff was adjudged and said judgment was duly paid by the United States. In said action the Bankers Pocahontas Coal Co., one of the petitioners herein, was plaintiff; plaintiff petitioner appearing in its own right and the collector as defendant, who was defended in said action by the United States District Attorney and the Solicitor of Internal Revenue (now General Counsel). In this proceeding and in said court action the subject matter of the action and of these proceedings is the same, namely, the depletion unit allowable in computing the amount of such depletion deduction as will return to the taxpayer the capital value existing in the coal content of the corpora(55) tion's property as of March 1, 1913.

In his computation of invested capital of the corporation for the calendar year 1920 in the deficiency appealed from herein, the Commissioner used the tax computation determined in said action as due and owing for the calendar year 1919, which was based upon the allowance of a

$0.05 depletion rate for 1919. In the years subsequent to 1919, the Commissioner has applied the depletion rate of $0.036 per ton. The court action was instituted February 17, 1923, and the judgment therein was entered January 31, 1928. The deficiency letters were mailed for 1920 on February 15, 1926; for 1921, 1922, and 1923 on February 12, 1926; for 1924, 1925, and 1926 on January 15, 1929. Before the issue of the last named deficiency notice the attention of the Commissioner was specifically called to the pendency and decision of the court action.

In the several taxable years, and particularly in 1919, the corporation received its contract payments each month and same when received were about thirty days overdue. The payment for December was consistently reported in the year's receipts, although same did not come to hand until January. In December, 1919, the corporation received a tax refund of $180, which it put on its books in January, 1920, and likewise received a contract payment of $5,434.66. These amounts were reported as income for 1919 and the Commissioner has included same again as 1920 income, as shown by the books to have been received in the latter year.

In 1920, the Flanagan Coal Co., which owned land ad- (56) jacent to the petitioner corporation, trespassed on the land of the petitioner corporation and removed coal to which it had no right. It then destroyed the entries so that the damage or extent of the operation could not be determined. The corporation discovered the situation in 1923 and brought suit for damages and, as a result of a compromise of the suit, received in 1924, $3,-770.40 in settlement and adjustment of the controversy. The petitioner corporation had no contractual relation with the trespasser and the settlement had no relation to the coal extracted, as the amount of same could not be determined. The Commissioner held the damages received were equivalent to a royalty and adjusted same by the allowance of $0.036 per ton as depletion on 15,000 tons estimated to have been damaged or removed by the trespasser.

In the several years involved herein the petitioner, Strother, as one of the corporation's stockholders, re-

ceived payments from the Bankers Pocahontas Coal Co. and reported same in his returns but did not return them as taxable income. The corporation received said amounts from its operating contracts and entirely distributed them, including any depletion reserve. No allowance was made by the Commissioner to the petitioner, Strother, for any depletion reserve received by him and the Commissioner added the entire receipts to his net income and has determined deficiencies accordingly.

OPINION

Smith: In these proceedings the Bankers Pocahontas (57) Coal Co. contends that it received no income during the taxable years and all of the moneys received as royalties were in part payment of coal in place which had been sold prior to March 1, 1913; that the typical contract quoted in part in the findings of fact constituted a sale of coal in place made before March 1, 1913, under the laws of West Virginia, and that on March 1, 1913, the petitioner held only a chose in action from which no taxable income was subsequently received; that leasing agreements similar to those involved in these proceedings have been held by the courts of Pennsylvania in Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66; 38 L. R. A. 826; Lehigh & Wilkesbarre Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919; Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197; and by the courts of West Virginia in Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; National Coal Co. v. Overholt, 94 S. E. 735 (W. Va.); to constitute sales of coal in place; that the Board is bound to give the same effect to such leasing agreements as has been given to them by the courts of the States of Pennsylvania and West Virginia.

This is the same contention as has been made before the Board in many different cases. Beginning with the case of Nelson Land & Coal Co., 3 B. T. A. 315, and following down through a number of decisions, this Board (58) has uniformly held that sums received as bonus or royalties from leases of oil and mineral rights were not income from the sale or exchange of capital assets, but constituted a part of the gross income that the peti-

tioner was obligated to return as a part of its gross income. It is likewise the same contention which was made before the District Court of the United States for the Southern District of West Virginia in the case of Bankers Pocahontas Coal Co. v. Albert B. White, referred to in our findings, which was a suit for the recovery of additional taxes paid for the years 1914 to 1919. The learned judge of that court disposed of that case in the following language:

This brings on the first contention of the plaintiff, that is, that the plaintiff, by the reserved rentals and royalties, is being paid for the land and the coal thereunder, and that such rentals and royalties are not "income" but "purchase money."

Personally, I believe this statement to be true, but I cannot, in the face of all the decisions, sustain it here.

I therefore hold, that the royalty payments are income, and should pay a tax as such.

Judicial decisions upon the point are many. See Hirschi v. United States, Ct. Cl. , decided May 6, 1929; Berg v. Commissioner, 33 Fed. (2d) 641, certiorari denied 50 S. Ct. 69; Stanton v. Baltic Mining Co., 240 U. S. 103; Von Baumbach v. Sargent Land Co., 242 U. S. 503; United States v. Biwabik Mining Co., 247 U. S. 116. In Hirschi v. United States, supra, the court stated:

The one question involved is whether the income re-
(59) ceived by the plaintiff from said lease is taxable as income from the sale of capital assets or his ordinary income. If it is from the sale of capital assets the plaintiff is entitled to a refund; if it is not, he is not so entitled. Since the decision in Stratton's Independence v. Howbert, 231 U. S. 399, following through Stanton v. Baltic Mining Co., 240 U. S. 103; Von Baumbach v. Sargent Land Co., 242 U. S. 503; United States v. Biwabik Mining Co., 247 U. S. 116, it has been consistently held that the trustees received from such leases of oil and mineral lands were to be treated as gross income. The principle is too well established to require extended discussion.

* * * * * * * * * *

The Federal Government is not limited in its selection of subjects for taxation by the construction of the State courts as to the property rights of individuals, provided the subject taxed was primarily a proper subject for taxation. Congress in passing a revenue act does not, and is not called upon to suit the revenue system of the country to the varying and conflicting decisions and laws of the different states. A revenue act is an act of Congress passed in the exercise of its constitutional right, and therefore the supreme law of the land, and where the constitutional powers of the Federal Government and the States conflict those of the States must give way.

Petition for writ of certiorari was denied by the Supreme Court in this case on October 21, 1929.

In Van Devender, 8 B. T. A. 697, contracts in West Virginia made by the petitioner and others from the mining of coal were held to constitute leasing agreements upon the authority of Henry L. Berg and Wife, 6 B. T. A. 1287, and Rosenberger v. McCaughn, 20 Fed. (2d) 139. Counsel for the petitioners suggest, however, that in the Van Devender case the petitioner made the contracts and (60) that they were not transferred to third parties; that the instant proceedings present the case of such transfer and that if there is any income received from the contract subject to tax it is ascertained by the exclusion of all capital from same, according to the final decision of Rosenberger v. McCaughn, 25 Fed. (2d) 699. We see no justification for the distinction sought to be made. The Bankers Pocahontas Coal Co. received its property in July, 1912, subject to certain leases upon the property. In our opinion the corporation simply stands in the shoes of the original lessors. The royalties received by it constitute part of its gross income. From such income it is entitled to deduct a reasonable amount for the depletion of its property during the taxable years.

In computing the deficiencies for the years 1920 to 1926, the respondent has used a depletion rate of $0.036 per ton of ore mined each year. The respondent held

that this was a reasonable depletion rate and that such rate multiplied by the tons mined each year constituted a reasonable deduction for depletion. The corporation taxpayer contends that this is not a proper rate and that its application does not permit the deduction of a reasonable amount for depletion. In support of its contention it submits the decision of the District Court made in the above cited case of Bankers Pocahontas Coal Co. v. Albert B. White, in which the court found that a reasonable depletion rate was five cents per ton multiplied by the number of tons of ore mined during each taxable (61) year. The evidence before the District Court was introduced before the Board and in addition much additional evidence showing the cost of the properties to the Bankers Pocahontas Coal Co. at the time they were acquired in 1912, and likewise the agreed estimated tonnages in each of the leases upon the land. With respect to the cost of the properties to the petitioner corporation D. J. F. Strother, the president of the corporation, testified as follows:

My recollection is that a bond issue outstanding on the property at that time was either two hundred and forty, or two hundred and sixty thousand dollars; I know I am right in either one amount or the other; we paid out sixty thousand dollars in cash; there were some troubles with the title and we paid on that, at one time, considering this stock at par, $35,000, and we withheld to straighten these titles out, to the Standard Pocahontas Coal Company, 600 acres of coal, which we valued anywhere from $50,000 to $150,000; we settled two or three other claims, and I do not think I am quite now qualified to speak about, of, I think I have them in my file there, some two thousand dollars more.

This would indicate a cost to the petitioner corporation of from $407,000 to $507,000. The evidence as to the March 1, 1913, value of the property is vague. In 1915, an engineer representing the Old Dominion Trust Co. of Richmond, Va., made a report on the company's property in which he stated that there were approximately 20,000,000 tons of mineable coal at an average value of five cents per net ton making a total value of $1,000,000. On or about December 31, 1917, an account was entered

upon the corporation's general ledger debiting coal lands
(62) $1,000,000 with the following explanation:

Estimated value as of March 1, 1913 of 6,000 acres coal land said to contain 20,000 tons of coal at five cents per ton.

The income-tax returns filed for those years claimed a March 1, 1913, value for the property of $1,000,000.

In United States v. Ludey, 274 U. S. 295, it was stated:

* * * The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. * * *

* * * * * * * * * *

The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken.

No essential difference is recognized in the decisions of the courts between depreciation and depletion, so far as the nature of the deduction under the taxing acts involved is concerned. Both are designed to return to the taxpayer the cost or March 1, 1913, value of property depreciated or depleted, whichever is the basis for the computation.

The evidence in the instant proceedings is that there was an estimated quantity of coal in place on March 1, 1913, of 37,608,642 tons. No contention is made anywhere that the March 1, 1913, value of this coal in place was in excess of $1,000,000. The depletion unit used by the respondent in his computation of $0.036 per ton will,
(63) upon the exhaustion of the coal deposits, return to the petitioner corporation a total of $1,353,911.11. The depletion rate used by the respondent will therefore return to the petitioner corporation an amount in excess

of the greatest claim made by it as to the value of the coal in place at March 1, 1913.

The respondent has determined that a depletion rate of $0.036 per ton is a reasonable rate. The Commissioner's determination of tax liability is prima facie correct. United States v. Rindskopf, 105 U. S. 418; Avery v. Commissioner, 22 Fed. (2d) 6; Brown v. Commissioner, 22 Fed. (2d) 797; Blair v. Roth, 22 Fed. (2d) 932. If the corporation is entitled to a higher rate of depletion than that determined by the respondent the burden is upon the corporation to prove the inadequacy of the depletion rate used by the respondent. We are of the opinion that it has not sustained that burden of proof.

In Docket No. 14517 the Bankers Pocahontas Coal Co. claims that its income for 1920 was overstated by the inclusion therein of royalties in the amount of $5,434.66 and taxes in the amount of $180, which were taxable as income of the year 1919, for which year the amounts were returned as income. The evidence indicates that the books of account show these receipts in 1920. It is contended, however, that the amounts were actually received by the corporation in 1919 and that it was through negligence that the amounts were not deposited in the bank until 1920. The evidence supports such claim. The contentions of the corporation upon this point are there-
(64) fore sustained.

In Docket No. 42664 it is contended that a certain receipt of the corporation in 1924, amounting to $3,770.40, from the Flanagan Coal Co., did not constitute a receipt of income. This amount was received in compromise of a suit brought against that company by the petitioner "to recover the value of the coal that had been extracted, plus damages to the plant." At the hearing of these proceedings petitioner's president was asked to relate "the facts briefly out of which the condition arose which resulted in the receipt of that amount of money [$3,770.40] in 1924 by your company." Petitioner's president testified:

The Flanagan Coal Company owned an adjoining piece of land to our land; we discovered that they had mined

across our boundary line in a particular seam of coal; I took that up with them and they first said they would pay for it. The matter hung on for some months; this was in 1920 when they had gone in there, at which time the price of coal was very high—anywhere from $6.00 to $15.00 a ton. They did not pay, and when I got my engineers to go down to undertake to measure up how much coal they had gotten out, they found out they had shot in the entries and we could not get in at all, so I brought a suit for damages to the property, and we eventually settled it and we got this $3,770 in 1924, for damage to our property, and that seam of coal I figured and figured over with my engineers as at least $10,000 because they had absolutely destroyed the method of going in on that side of the hill.

He further testified on cross-examination:

We claimed our damages very considerably in excess of that [$3,770.40], but the Flanagan Coal Co. at that time was in a pretty precarious condition financially, and we figured every little bit would help, and we got as (65) much as we could.

The respondent determined that the $3,770.40 in question was a part of the petitioner's gross income; that the trespasser had mined 15,000 tons of coal from the corporation's land; and that the petitioner was entitled to deduct from gross income, in its tax return for 1924, $540 for depletion in respect of the coal removed.

The taxing acts permit the deduction from gross income of losses sustained during the taxable year when not compensated for by insurance or otherwise. (Section 234 (a) (4), Revenue Acts of 1918 and 1921.) If there was a loss sustained by the Bankers Pocahontas Coal Co. as a result of the tortious act of the Flanagan Coal Co., it was sustained in 1920, and the amount of the loss not compensated for by insurance or otherwise is deductible from the gross income of 1920. The evidence does not, however, afford facts from which the amount of the loss may be determined. We do not know what the cost of the coal removed by the trespasser was to the petitioner nor its March 1, 1913, value. If the Banker's Pocahontas

Coal Co. is predicting the loss and damage to the property upon the inflated prices of coal in 1920, we think there is no justification for basing a deductible loss upon such inflated values. Joseph E. Hubinger, 13 B. T. A. 960, affirmed by the Circuit Court of Appeals for the Second Circuit December 2, 1929. The deduction of any loss for 1920 must therefore be disallowed for lack of proof of
(66) the amount of the loss, if any.

The same situation obtains with respect to the year 1924. The company received from the trespasser $3,770.40. The petitioner has found that all but $540 of this amount (which he has allowed as a deduction from gross income as depletion) constituted taxable income of the company for 1924. The company has submitted no evidence that the cost or March 1, 1913, value of the coal removed by the trespasser was in excess of $540 or that such basis plus damages to the property was in excess of $540. The determination of the Commissioner is therefore sustained for lack of evidence showing error on the part of the respondent. Joseph E. Hubinger, supra.

In Docket No. 14517, with respect to the year 1920, and in Docket No. 14516, with respect to the year 1921, additional error is alleged in the adjustment of surplus and, therefore, in the computation of the petitioner corporation's invested capital. The correctness of the adjustment depends upon the determination of a proper depletion allowance. It therefore follows that, when a proper depletion rate has been determined under the major issue of the proceedings, the establishment of a proper depletion reserve and, consequently, the proper adjustment of surplus will necessarily follow and be made the subject of appropriate recomputation under the Rule 50 settlement.

With respect to the years 1920 and 1921, the corporation also claims that there has been an improper proration of dividends affecting its invested capital for those years. This raises the question of a tentative tax adjust-
(67) ment such as was involved in L. S. Ayers & Co., 1 B. T. A. 1135. The rule of the Board in L. S. Ayers & Co.,

supra, should be applied in the recomputation of the deficiencies.

The only issues raised in the three proceedings taken by D. J. F. Strother relate to an overstatement of his income for the years in question resulting from the inclusion therein of the dividends received by him from the corporation. The respondent submits that the determination of the nature of the receipt by the corporation under the leases will also determine the nature of the dividends paid out of its receipt to the stockholder. To the extent that the distribution made by the corporation constitutes a distribution of its depletion reserve the amount received by Strother in nontaxable. Parties are in full accord as to the treatment to be given the individual appeals.

Reviewed by the Board.

Judgment will be entered under Rule 50.

MOTION FOR REHEARING AND MODIFIED FINDINGS OF FACT AND OPINION

(68) Filed Feb. 27, 1930.

U. S. BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,

vs. Docket Nos. 14516-17 and 42664.

Commissioner of Internal Revenue, Respondent.

D. J. F. Strother, Petitioner,

vs. Docket Nos. 10472, 25275 and 32170.

Commissioner of Internal Revenue, Respondent.

Come the petitioners herein, and move the Board to set aside its findings of fact and decision promulgated in the above entitled appeals on January 22, 1930, (providing for a Rule 50 redetermination) and to grant petitioners a rehearing, or modified findings of fact and opinion herein, for cause:

1. That the Board erred in including in said findings of fact, statements concerning the contracts upon the property, the estimated recoveries of coal tonnage on March 1, 1913, and the tonnage mined and royalty receipts from each of the several leases; which said evidence was offered at the hearing (record p. 124) by stipulation of parties only for purposes of any computation under Rule 50, and which said evidence was not introduced nor available as the basis of any findings of fact in reference to the issues between the parties herein.

2. Petitioners move to strike from said findings of fact, the sentence "the cose to the corporation of the properties acquired by it was between $407,000 and $507,000", because said evidence was irrelevant and incompetent, and was received over the objections of petitioners.

3. That the Board erred in its conclusion of law that the agreements herein between the corporate petitioner and operating companies should not be held to be sales of coal in place, being the legal construction admitted to attach to said agreements under the laws of West Virginia.

4. That the Board erred in setting forth evidence in its opinion, concerning the value of the property on March 1, 1913, which evidence is not set forth in its findings of fact.

5. That the Board erred in not including in its find-
(69) ings of fact, that amount of the depletion allowable to the corporate petitioner is res adjudicata herein under the decision of Bankers Pocahontas Coal Co. vs. Albert White, Collector, and, also, under its findings of fact that the subject matter of said decision and the parties therein are identical with those involved in the present proceedings.

6. That the Board erred in stating in its opinion additional evidence as to the cost of the properties was introduced and also regarding the estimated tonnages in each of the leases; it appearing said evidnce was taken over the objections of petitioners upon cross examination by respondent, and otherwise was introduced subject to stipulation only for purposes of a Rule 50 computation.

7. That the Board erred in holding the damages recovered from the Flanagan Coal Company constitute a recovery of the value of coal mined, subject to allowance for depletion, as contradictory to its findings of fact thereon.

8. That the Board having erred as aforesaid, in its decision of the Bankers Pocahontas Coal Company appeal likewise erred in applying its principles to decision of the appeals of petitioner Strother.

And, it appearing this decision was reviewed by the Board, Petitioners request that this motion for rehearing and modification be reheard by the Board.

(s) CAMDEN R. McATEE,
Attorney for Petitioners.

(70) **ORDER**

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Co.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 14516, 14517, 42664, 10472, 25275, 32170.

Counsel for petitioners in the above entitled proceedings having filed a motion with the Board on February 27, 1930, for a rehearing or for modified findings of fact and opinion as set forth in the report promulgated January 22, 1930, alleging that the Board erred in including in said findings of fact certain data contained in a stipulation which counsel now claims was introduced solely for purposes of any recomputation under Rule 50; that a certain findings of fact be stricken from the report on the ground that the evidence supporting said findings of fact was irrelevant, incompetent, and received over objection of counsel for petitioners; that the Board erred in several conclusions of law as set forth in its opinion and in not including in its findings of fact a certain other conclusion of law to the effect that the amount of allowable depletion is res adjudicata; that the Board erred in setting forth certain evidence in its opinion, and the premises considered and due consideration having been given thereto as well as to statements of counsel for the petitioners at the hearing in the above entitled proceedings and to his then position with respect to the matters presently complained of, and after reconsideration of the record herein, it is

ORDERED that the motion be and the same is hereby denied.

(Signed) CHARLES P. SMITH
Member,
United States Board of Tax Appeals.

Washington, D. C.

Entered: March 6, 1930.

CPS:aa.

NOTICE OF SETTLEMENT

(71) Filed Mar. 31, 1930.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner.

v.

Docket Nos.
14516-14517-42664

Commissioner of Internal Revenue,
Respondent.

The annexed proposed determination of deficiency under the opinion of the Board of Tax Appeals heretofore rendered herein will be presented to the Board for settlement on the .... day of ..... 1929, at 9.30 A. M.

This notice of proposed determination is submitted in accordance with the decision of the Board without prejudice to the Commissioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

(Signed) C. M. CHAREST
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

MAXWELL E. McDOWELL,
FRANK B. SCHLOSSER,
Special Attorneys,
Bureau of Internal Revenue.

(72) STATEMENT
IT:AR:F-6
LGS

In re: Bankers Pocahontas Coal Company, Welch, West Virginia.

Docket Nos. 14516, 14517, 42664.

Years	Additional Tax
1920	$5,202.27
1921	7,849.75
1922	4,150.08
1923	4,102.78
1924	3,677.23
1925	6,855.09
1926	7,333.85
Total	$39,171.05

1920

Income 60-day letter		$44,907.86
Deduct:		
Depletion (Board's decision)	$16,423.02	
60-day letter	16,371.65	
Balance	$ 51.37	
Royalties	$5,434.66	
Taxes	180.00	
		5,666.03
Net income adjusted		$39,241.83

Invested Capital

60-day letter		$294,955.64
Add:		
Dividend adjustment,		
60-day letter	$20,130.33	
Board's decision	19,519.33	611.00
Invested capital adjusted		$295,566.64

Excess Profits Credit

8% of invested capital plus $3,000.00 equals	$26,645.33

(73) Computation of Tax

Income	Credit	Balance	Rate	Tax
$39,241.83	$26,645.33	$12,596.50	20%	$2,519.30

Net income adjusted		$39,241.83	
Less:			
Profits tax	$2,519.30		
Exemption	2,000.00	4,519.30	
Taxable at 10%		$34,722.53	3,472.25
Tax liability			$5,991.55
Previously assessed			789.28
Additional tax			$5,202.27

1921

Income 60-day letter			$47,022.84
Add:			
Depletion 60-day letter		$11,966.69	
Board's decision		11,921.87	44.82
Net income adjusted			$47,067.66

Invested Capital

60-day letter			$281,652.96
Add:			
1920 income tax prorated			
60-day letter		$3,206.20	
As corrected, $5,991.55 x .4226		2,532.03	
		$ 674.17	
Dividend adjustment			
60-day letter	$22,170.90		
Board's decision	20,452.62	1,718.28	2,392.45
Invested capital adjusted			$284,045.41

Excess Profits Credit

8% of invested capital plus $3,000.00 equals	$25,723.63

(74) Computation of Tax

Income	Credit	Balance	Rate	Tax
$47,067.66	$25,723.63	$21,344.03	20%	$4,268.81

Net income adjusted	$47,067.66	
Less:		
Profits tax	4,268.81	
Taxable at 10%	$42,798.85	4,279.89
Tax liability		$8,548.70
Previously assessed		698.95
Additional tax		$7,849.75

1922

Income 60-day letter		$61,947.12
Add:		
Depletion 60-day letter	$16,806.09	
Board's decision	16,799.36	6.73
Net income adjusted		$61,953.85
Tax at 12½%		$ 7,744.23
Tax liability		$ 7,744.23
Previously assessed		3,594.13
Additional tax		$ 4,150.08

1923

Income 60-day letter		$58,656.51
Deduct:		
Depletion Board's decision	$17,177.79	
60-day letter	17,090.60	87.19
Net income adjusted		$58,569.32

Tax at 12½%		$ 7,321.17
Tax liability		$ 7,321.17
Previously assessed		3,218.39
Additional tax		$ 4,102.78

(75) 1924

Income 60-day letter		$55,362.70
Add:		
Depletion 60-day letter	$23,073.93	
Board's decision	20,553.41	2,520.52
Net income adjusted		$57,883.22
Tax at 12½%		$ 7,235.40
Tax liability		$ 7,235.40
Previously assessed		3,558.17
Additional tax		$ 3,677.23

1925

Income 60-day letter		$49,377.26
Add:		
Depletion 60-day letter	$22,205.65	
Board's decision	18,851.47	3,354.18
Net income adjusted		$52,731.44
Tax at 13%		$ 6,855.09
Tax liability		$ 6,855.09
Previously assessed		None
Additional tax		$ 6,855.09

1926

Income 60-day letter		$52,879.06
Add:		
Depletion 60-day letter	$23,993.33	
Board's decision	22,547.56	1,445.77
Net income adjusted		$54,324.83
Tax at 13½%		$ 7,333.85
Previously assessed		None
Additional tax		$ 7,333.85

OBJECTIONS OF PETITIONER TO TAX DETERMINATION PROPOSED BY RESPONDENT, AND COUNTER DETERMINATION PROPOSED BY PETITIONER

(76) Filed May 21, 1930.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket Nos. 14516, 14517, 42664.

Commissioner of Internal Revenue,
Respondent.

The petitioner, Bankers Pocahontas Coal Company, without prejudice to its right to contest the correctness of the tax determination herein, pursuant to the statute in such cases made and provided, and with said right expressly reserved, objects and excepts to the deficiency computation of respondent proposed and filed herein on March 31, 1930 as being an erronous tax computation, for cause as follows:

1. For the years 1920 to 1926 inclusive, depletion has been computed at .036 per ton on the basis of tonnage mined each year.

In fact, petitioner received royalties in each of said years on tonnage in excess of the tonnage mined, said excess and the depletion thereon, being as follows:

	1920	1921	1922	1923	1924	1925	1926
Lease #1	62,811	65,340	64,136	68,578	62,072	51,196	29,971
Lease #3	300	1,712			12	75	1,647
Lease #4	13,082	84,703	9,821	3		8,830	554
Lease #4	168,269	281,226	324,950	266,630	339,780	207,208	181,398
Lease #5	1,913	1,511	162				
Lease #6		32,163	19,811	5,040			44,564
	242,549	399,307	359,616	330,171	401,864	267,164	254,840
@ .036	$8,731.76	$14,375.05	$12,946.18	$11,886,16	14,467.10	$9,617.90	$9,174.24

Petitioner states disallowance of depletion on tonnage paid for but not mined distorts the taxable income of petitioner by including therein royalty payments properly subject to a depletion allowance, and that the right of the operating companies thereafter to mine coal previously paid for was recognized and admitted by petitioner; that the findings of fact of the Board are erroneous in stating that a depletion unit of .036 per ton was allowed by respondent to petitioner in the several years only upon coal mined, and in fact a different rate was allowed in some of the years and applied to coal paid for, and not alone to coal mined, in the deficiency letters in evidence.

2. For said years 1920 and 1921, the computations of invested capital are dependent as to the item "Dividend Adjustment" upon the allowance of proper depletion deductions in the computation of taxable net income, (78) and the proper invested capital of petitioner for each of said years cannot be ascertained until the erroneous calculation of allowable depletion is corrected.

3. The tax liability for 1920 and for 1921 cannot be computed until the aforesaid items of correct taxable net income and invested capital are ascertained.

4. For the years 1922 to 1926 inclusive allowance of depletion as claimed in paragraph 1 hereof will compute the several deficiencies as follows:

	1922	1923	1924	1925	1926
Adjusted Net Income	$61,953.85	$58,569.32	$57,883.22	$52,731.44	$54,324.83
Additional Depletion	12,946.18	11,886.16	14,467.10	9,617.90	9,174.24
Revised Net Income	$49,007.67	$46,683.16	$43,416.12	$43,113.54	$45,150.59
Tax	6,125.96	5,835.39	5,427.02	5,604.76	6,095.33
Previously Assessed	3,594.15	3,218.39	3,558.17	None	None
Deficiency	$2,531.81	$2,617.00	$1,868.85	$5,604.76	$6,095.33

6. Petitioner moves the Board for amended and (79) supplemental findings of fact, and renews its

motion heretofore filed for a rehearing and reconsideration of the findings of fact and opinion of the Board herein.

WHEREFORE, petitioner prays the determination of deductible depletion at .036 per ton upon the tonnage paid for in the several years, the recomputation of dividend adjustments as a factor of invested capital for the years 1920 and 1921, the determination of any deficiencies for years 1920 and 1921 as the result of said adjustments, and the determination of any deficiencies for the years 1922 to 1926 inclusive in the amounts shown in paragraph four hereof, and for all other proper relief.

(s) CAMDEN R. McATEE,
Attorney for Petitioner,
1021 Tower Building,
Washington, D. C.

(80) **ORDER**

UNITED STATES BOARD OF TAX APPEALS

Washington

Bankers Pocahontas Coal Co., Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 10472, 14516, 14517, 25275, 32170, 42664.

At an oral hearing of these proceedings under Rule 50 of the Board's Rules of Practice on June 18, 1930,

counsel for the petitioners made a motion for a rehearing or reargument of the cases for the purpose of filing additional evidence and for the purpose of raising the question as to whether depletion should be based upon the tons of coal mined each year or upon the tons of coal paid for by the lessees each year. In its opinion the Board held in accordance with Littie A. Knapp, 7 B. T. A. 790, and A. T. Cooper, 7 B. T. A. 798, that the depletion deduction should be based upon the tons of coal mined. It is, therefore,

ORDERED that the motion for rehearing or reargument of the cases be and the same is denied.

(Signed) CHARLES P. SMITH
Member,
United States Board of Tax Appeals.

Entered: July 15, 1930.

CPS:aa.

(81) **DECISION**

UNITED STATES BOARD OF TAX APPEALS

Washington

Bankers Pocahontas Coal Co., Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 14516, 14517, 42664.

Pursuant to the findings of fact and opinion promulgated by the Board in the above entitled proceedings January 22, 1930, counsel for the respondent, on March 31, 1930, filed a notice of settlement under Rule 50 of the

Board's Rules of Practice and, on May 21, 1930, counsel for the petitioner filed objections to "Tax Determination Proposed by Respondent and Counter Determination Proposed by Petitioner." The principal point of difference between the alternative notices of settlement is whether the depletion allowance should be computed upon the basis of coal mined each year or upon the basis of tons of coal paid for by the lessees each year. The Board held that the allowance for depletion should be based upon the tons of coal mined and the respondent's notice of settlement is computed in accordance with the opinion of the Board. A hearing on the redetermination under Rule 50 was had on June 18, 1930, at which counsel for the respondent and counsel for the petitioner admitted that the notice of settlement filed by the respondent was in accordance with the opinion promulgated. Wherefore, it is

ORDERED and DECIDED that there are deficiencies in income and profits tax for the years 1920 to 1926 as follows:

1920	$5,202.27
1921	7,849.75
1922	4,150.08
1923	4,102.78
1924	3,677.23
1925	6,855.09
1926	7,333.85

(Signed) CHARLES P. SMITH
Member,
United States Board of Tax Appeals.

Entered Jul 16 1930

CPS:aa

(82) **ORDER**

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Co., Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 10472, 14516, 14517, 25275, 32170, 42664.

It appearing as a result of a hearing on the notice of settlement of the deficiencies of D. J. F. Strother, Docket Nos. 10472, 25275, and 32170, that there is an error in the last paragraph of the findings of fact of the Board, promulgated January 22, 1930, 18 B. T. A. 901, it is

ORDERED that the last paragraph of said findings of fact be deleted and that there be substituted therefor the following paragraph:

In the several years involved herein the petitioner, Strother, as one of the corporation's stockholders, received payments from the Bankers Pocahontas Coal Co. and reported same in his returns but did not return them as taxable income. The corporation received the royalties of the contracts, used such portion as was necessary for payment of the ordinary and necessary expenses of administering business, set aside a certain reserve to meet pending Federal taxes and distributed the rest to the stockholders. No allowance was made by the Commissioner to the petitioner, Strother, for any depletion

reserve received by him and the Commissioner added the entire receipts to his net income and has determined deficiencies accordingly.

(Signed) CHARLES P. SMITH
Member,
United States Board of Tax Appeals.

Washington, D. C.,

Entered September 26, 1930.

PETITION FOR REVIEW

(83) Filed Jan. 6, 1931.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES
FOURTH CIRCUIT

Bankers Pocahontas Coal Company,
Appellant,

v. Docket No. .....

Commissioner of Internal Revenue,
Appellee.

Petitioner appellant, Bankers Pocahontas Coal Company, being aggrieved by a decision of the United States Board of Tax Appeals (hereinafter called the "Board") determining additional income and profits taxes of $39,171.05 and legal interest for the calendar years 1920 to 1926, inclusive, as entered on July 16, 1930, in the appeal of Bankers Pocahontas Coal Company v. Commissioner of Internal Revenue, No. 14516, 14517 and 42664 (consolidated) on the docket of said Board, hereby respectfully submits its petition for review thereof by this Court, and for cause in support thereof states as follows:

1. Now and at the times hereinafter mentioned peti-
(84) tioner appellant was and is a corporation organized under the laws of the State of West Virginia with its principal office in said state and within the jurisdic-

tion of this Court, and prosecutes this proceeding in its own right. Appellant is engaged in no business, and its only activity is the collection for and distribution to its stockholders of moneys payable by operating companies for coal taken by them from its properties. Appellee is the duly appointed and qualified Commissioner of Internal Revenue, and is joined herein as a party in his official capacity. For the several years 1920 to 1926, inclusive, petitioner appellant filed its returns for income and profits tax determination and assessment with the Collector of Internal Revenue at Parkersburg, West Virginia, which office is within the Circuit of this Court, and whereby jurisdiction of this petition for review is claimed pursuant to Section 1001-2 of the Revenue Act of 1926.

2. For the calendar years 1920 to 1926, inclusive, appellant made and filed its income and profits tax returns to disclose its gross income and the deductions (85) and credits against same allowed by the several Revenue Acts, as computed upon a cash receipts and disbursement basis, and to permit assessment of tax upon the resulting income, if any, and paid any tax shown thereby for each of said taxable years.

3. (a) In each of said taxable years the major portion of the gross income of appellant, and which is here in controversy, consisted of money payments received from certain original operating companies, or their successors in interest, under contracts, for the mining and taking of coal by them from the lands owned in the several years by appellant before March 1, 1913, and which contracts were made and existing with the predecessors of appellant, and were acquired by appellant before March 1, 1913, and have since been owned by appellant. Exclusive of the coal content thereof so contracted to be taken and paid for by said operating companies, said lands owned by appellant were and are without value. Appellant reported said money payments in its several returns as gross income received each year, but did not include same in its several returns as any part of taxable net income for cause that appellant claimed and alleged said money payments were the (86) proceeds of sales of coal in place effected and de-

termined by said contracts before March 1, 1913, and thereafter continuing, and that consequently no part of said payments was subject to any income and profits tax under the Sixteenth Amendment to the Constitution of the United States.

(b) In the taxable year 1924 appellant received $3,770.40 in settlement of its action for damages as the result of a trespass in 1920 upon its property by a certain operating company and a taking of its coal to an unascertained extent, said operating company having no contractual relation with appellant, and having destroyed its entries so the extent of its trespass and taking of coal could not be ascertained. Appellant reported said payment as gross income, but did not include same in its return for 1924 as any part of taxable net income on the ground and for cause that same constituted a replacement of capital to the extent of the amount received.

4. Upon review and examination of said returns of appellant, the appellee, Commissioner of Internal Revenue, ruled that the money payments to appellant in the several years from the operating companies constituted payments of royalties by lessees to a lessor and were (87) not proceeds of a sale of coal in place, and that said receipts were taxable to appellant in the years received to the extent same exceeded any return of capital therein received, and that said return of capital or depletion amounted to an average amount of 3.6¢ per ton of coal for the years 1920-1923 and for the years 1924-1926 amounted to varying individual amounts for each operation, averaging 2.6¢ per ton of coal paid for. Appellee further ruled the 1924 damages of $3,770.40 constituting income after deduction therefrom of capital or depletion at the rate of 3.6¢ upon 15,000 tons of coal. The taxable net income reported by appellant in its several returns was accordingly adjusted and increased, and the resulting deficiencies in tax were proposed against appellant by official letters from the appellee Commissioner.

5. Whereupon, within the time and as allowed by law, appellant, alleging error of law and fact therein on the part of appellee Commissioner, appealed to said Board

from said official findings as to each of said adjustments and the resulting tax proposals, praying a redetermination thereof, and issue was joined on said appeals by answers filed by appellee Commissioner.

6. At the consolidated hearing of said appeals by (88) the Board on May 3, 1929, appellant presented evidence to show said proposed deficiencies were erroneous and contrary to law.

Appellant alleged said money payments were proceeds of sales of coal in place contracted for before passage of the Sixteenth Amendment, and by agreement of the parties a typical contract was stipulated in evidence on said issue; appellant further alleged in the alternative that if appellant and said operating companies were lessor and lessees under said contracts, in such event the depletion rates proposed by appellee Commissioner were erroneous because previously established to be 5¢ per ton. Upon this issue appellant offered in evidence the proceedings in an action at law by appellant in the United States District Court for the Southern District of West Virginia against the Collector of Internal Revenue for recovery of income and profits taxes for the years 1914 to 1919, inclusive, alleged to have been erroneously and illegally determined and collected through use of 3.6¢ per ton as the depletion rate, wherein the opinion and judgment of the court was that appellant in the computation of said taxes was entitled to a deple- (89) tion rate of 5¢ per ton, and a recovery of said taxes was thereby adjudged and paid, and which judgment has always been in full force and effect, and finally established said depletion rate between the parties. Appellant further offered testimony that the damages of $3,770.40 received in 1924 had no relation to mining of any determinable quantity of coal.

At the end of the hearing, by agreement the parties stipulated of record for use in the computation of deficiencies, if any, after decision of the appeals by the Board, schedules showing the contracts upon the several coal properties of appellant, the estimated recoverable tonnage therein on March 1, 1913, and the tonnage mined and money payment received as to each property for the calendar years 1913 to 1926, inclusive.

7. Thereafter, the findings of fact and decision of the Board, promulgated on January 22, 1930, approved the determination of the appellee Commissioner that the money payments to appellant from said contracts were royalties of a lessor subject to allowance for depletion of the property from which derived; that the rate of 3.6¢ per ton of coal mined, found to have been deter-
(90) mined by appellee Commissioner, was a reasonable depletion deduction in the several years, and that the damages received in 1924, less depletion, were taxable income in the absence of evidence that the tortuous taking of coal in 1920 established an ascertained loss, or that the value of the coal taken exceeded the depletion allowance.

8. Appellant filed its motion to set aside and modify said findings of fact and decision and for a rehearing, and same was overruled without hearing.

9. A proposed determination of tax pursuant to said findings and opinion being offered by appellee Commissioner, appellant filed its objections and counter proposal and the parties were heard. It appeared therein from both parties as revealed by the deficiency letters the Board finding that depletion was computed by appellee Commissioner upon coal mined was in error, and that depletion had been computed on coal paid for, and appellant tendered and offered in evidence contracts or leases to show the payments per ton by operating com-
(91) panies permitted the mining of the coal at any time thereafter. Said contracts we excluded upon objection of appellee, and the Board took the matter of reopening and rehearing the appeals under advisement. Thereafter on July 16, 1930, the Board approved and ordered the determination of deficiencies proposed by the appellee Commissioner to be entered in the following amounts:

1920	$5,202.27
1921	7,849.75
1922	4,150.08
1923	4,102.78
1924	3,677.23
1925	6,855.09
1926	7,333.85

10. Appellant states the true determination of its gross income from said contract money payments as taxable or non-taxable, and of the amount of depletion, if any, to which appellant may be entitled, is necessary properly to ascertain its liability for taxes in the several years, and also to ascertain the liability for taxes therein of its several stockholders to whom said gross income is distributed by appellant.

11. Appellant states the Board in its findings of fact found as follows upon the issues herein presented, to (92) which findings appellant offers no objection.

"In July, 1912, the Bankers Pocahontas Coal Co., a West Virginia corporation (hereinafter sometimes called the corporation), acquired the fee simple title to approximately 6,200 acres of coal lands, including both the surface and the mineral rights in the State of West Virginia. The land had no appreciable value except for the coal content.

"Upon incorporation in 1912, the corporation acquired by formal assignment and has continued to retain the beneficial interest of the original owners in certain contracts affecting the coal content which were executed in 1901 and 1902 with various operating companies and to which contracts the 6,200 acres and coal content were subject.

"These contracts were originally prepared by D. J. F. Strother, who at that time was attorney, director, and stockholder in the predecessor corporations. The form of the contracts is that prevailing in the West Virginia coal fields, which followed the Pennsylvania form of contracts as introduced by Pennsylvanians who were largely instrumental in the early coal development in the West Virginia field.

"By agreement of parties a copy of such contracts was offered and received in evidence as typical of the several contracts existing on the acreage acquired by the corporation in 1912. The specimen contract provides in part as follows: (Contract inserted.)

* * * * *

"All of these agreements were in the main, with the (93) exception as to minor and non-essential provisions, the same as the sample agreement set forth above as the Cletus lease.

"From time to time these agreements were reassigned by the lessees to new and different operating leases, largely with the permission of the lessor corporation."

* * * * *

"In the several taxable years in controversy the corporation was upon a cash receipts and disbursements basis of accounting and its income, except minor items not in controversy, consisted of payments received under the several contracts from the various operating companies, and income and profits-tax returns were filed for each of the taxable years and thereafter audited by the Commissioner resulting in the deficiency notice forming the basis of the present proceedings."

* * * * *

"For prior years 1914 to 1919, inclusive, the Commissioner proposed additional taxes in the amount of $6,267.08 and required the corporation to pay same, which thereafter brought an action on February 17, 1923, in the United States Court for the Southern District of West Virginia against the collector to recover same on the grounds that payments under said contracts received by the corporation were the proceeds of a sale of coal in place consummated before March 1, 1913, or of choses in action existing on said date, or that petitioner plaintiff, as a lessor, was entitled to a unit depletion rate of not less than $0.05 per ton mined in the computation of net taxable income, and consequently said taxes were erroneously and illegally assessed and collected. The (94) issues were made in said action, and same were submitted for judgment upon the evidence adduced by the parties, and were decided by opinion of the court and judgment entered thereon that petitioner plaintiff in the computation of said taxes was entitled to a depletion unit of $0.05 per ton instead of $0.036 computed

by the Commissioner. A recovery of $5,373.01 from said collector by petitioner plaintiff was adjudged and said judgment was duly paid by the United States. In said action the Bankers Pocahontas Coal Co., one of the petitioners herein, was plaintiff; plaintiff petitioner appearing in its own right and the collector as defendant, who was defended in said action by the United States District Attorney and the Solicitor of Internal Revenue (now General Counsel). In this proceeding and in said court action the subject matter of the action and of these proceedings is the same, namely, the depletion unit allowable in computing the amount of such depletion deduction as will return to the taxpayer the capital value existing in the coal content of the corporation's property as of March 1, 1913."

* * * * *

"In 1920, the Flanagan Coal Co., which owned land adjacent to the petitioner corporation, trespassed on the land of the petitioner corporation and removed coal to which it had no right. It then destroyed the entries so that the damage or extent of the operation could not be determined. The corporation discovered the situation in 1923 and brought suit for damages and, as a result of a compromise of the suit, received in 1924, $3,770.40 in settlement and adjustment of the controversy. The petitioner corporation had no contractual relation with the trespasser and the settlement had no relation to the coal (95) extracted, as the amount of same could not be determined. The Commissioner held the damages received were equivalent to a royalty and adjusted same by the allowance of $0.036 per ton as depletion on 15,000 tons estimated to have been damaged or removed by the trespasser."

12. Appellant further states the Board in its findings of fact found as follows upon the issues herein presented, to which findings appellant offers objection:

"The cost to the corporation of the properties acquired by it was between $407,000 and $507,000.

"The contracts of the property on March 1, 1913 are

shown by the following: Schedule 1 (Details here omitted).

"The estimated recoverable tonnage on March 1, 1913, is shown by the following: Schedule 2 (Details here omitted).

"The tonnage mined and royalty receipts of the corporation for the years 1913 to 1919, inclusive, is shown by leases as follows: Schedule (Details here omitted).

"The tonnage mined, the tonnage paid for, and the royalty receipts for the taxable years involved in these proceedings are shown by the following: Schedule (Details here omitted).

* * * * *

"In computing the deficiencies the Commissioner con-
(96) sidered the relation of the corporation and the operating companies to be that of lessor and lessee and allowed the corporation a depletion deduction of $0.036 per ton mined for the years 1920 to 1926, inclusive, the same depletion rate as was allowed by the Commissioner for 1919 and prior years."

13. Appellant believes and avers that errors of law and fact were committed by the Board in its aforesaid findings of fact, decision and determinations to the damage and prejudice of appellant, as shown by the following

ASSIGNMENT OF ERRORS

1. In its ruling that the payments to appellant by the operating companies under the typical contracts are part of the gross income of appellant subject to tax, and are not income exempt from tax because realized from a sale of coal in place completed before March 1, 1913.

2. In its ruling that the judgment of the United States Court of West Virginia was not conclusive that a depletion rate of 5c per ton was available to the appellant in the subsequent taxable years here involved.

3. In its admission and use of alleged additional evidence of the cost of the properties, to which objections (97) and exceptions were made at the time of offer of same, and of tonnages in each of the several properties, which schedules were offered solely for possible computations of the taxes, if any, determinable under the decision of fact and law otherwise to be made by the Board, and in its failure to exclude and disregard said alleged additional evidence.

4. In its ruling that the damages received in 1924 constituted income subject to depletion and not a replacement of capital.

5. In its ruling, refusing to reopen or modify its findings of facts and its opinion or grant appellant any rehearing, made in overruling the motion of appellant therefor.

6. In its ruling and refusal to reconsider and correct its finding that 3.6c per ton mined was applied by appellee Commissioner in the several taxable years.

7. In its ruling and refusal to receive evidence to establish that coal paid for should be established as the (98) basis of depletion instead of coal mined.

8. In other respects apparent of record.

WHEREFORE, your petitioner appellant prays that the aforesaid decision and determination of said Board entered as aforesaid be reviewed and reversed by this Honorable Court, and for all other and further relief as the Court shall deem meet and proper in the premises.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Appellant.

District of Columbia:

CAMDEN R. McATEE, being duly sworn, deposes (99) and says that he is one of the attorneys for the

petitioner appellant; that he knows the contents of the foregoing petition; that to the best of his knowledge and belief the statements therein are true, and that the assignments of error are well taken, and intended to be argued.

CAMDEN R. McATEE,

Subscribed and sworn to before me this 6th day of January, 1931.

ETHEL R. GUISE,
Notary Public.

(SEAL)

NOTICE AND SERVICE OF PETITION FOR REVIEW

The General Counsel (Hon. C. M. Charest), Bureau of Internal Revenue, Washington, D. C., will please hereby take notice—

That on January 6th, 1931, a petition for review by the Circuit Court of Appeals of the United States for the Fourth Circuit of the Board decision and determination in the above entitled appeals was filed with the Clerk of said United States Board of Tax Appeals, and a true copy of said petition is herewith served upon you.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Petitioner.

Service of above notice and receipt of copy of petition for review is hereby acknowledged this 6th day of January, 1931.

C. M. CHAREST,
Attorney for Appellee.

STATEMENT OF EVIDENCE

(100) Filed July 14, 1931.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket Nos. 42664, 14516-7.

Commissioner of Internal Revenue,
Respondent.

At hearings of the above entitled appeals, (consolidated for hearing) on May 3, 1929, and at subsequent adjournments thereof, before Hon. C. P. Smith, Board Member, the following proceedings were had and evidence offered material to the issues presented by petitioner as appellant in its petition for review of said appeals by the United States Circuit Court of Appeals for the Fourth Circuit.

To maintain the issues on its part joined, petitioner offered oral testimony of its witness D. J. F. Strother, President of petitioner, and various written records as exhibits, and respondent to maintain the issues on its part joined, offered oral testimony of said Strother.

The substance of the testimony given by said witness, (101) of the exhibits introduced, and of the proceedings herein, was and is as follows:

D. J. F. Strother: I am a lawyer and banker, and am President of the Bankers Pocahontas Coal Company since its organization, and am practically the whole thing. This company was organized in 1911-1912 under the laws of West Virginia, and the property was previously held for a year in the name of trustees. Its gross acreage is approximately 6,000 acres, valuable for the coal that is apparently in the property, and exclusive of the coal content it has no value. When the property was acquired in 1912 it was subject to certain contracts which

were acquired by the company, together with the beneficial interest in same, and the fee simple title to the land. The interest so acquired in the contracts was that of an owner, allowing another person to operate the coal property, and that right or beneficial interest as an owner has since been held by the company. I am familiar with the lease known as the Cletus lease, and attached as an exhibit copy to the petitioner's appeal No. 14517, having prepared that lease; and with the consent of the respondent I identify and offer said lease in evidence as "Strother (102) Exhibit No. 1." Said lease is set forth in full in the Board's findings of fact (18 B. T. A. 901,903), and reference is made to same for all purposes. The Cletus lease was drawn by me on or about June 17, 1901 while I was practicing law in the neighborhood of these properties; while I was personal counsel for the owners of the company, and also a stockholder and director. This was the first work I did in West Virginia. The form of the Cletus lease is the same as prevailed at that time in the West Virginia coal fields, and I was familiar with the leases in use there at that time. Such leases follow the Pennsylvania form, because whole sections of the country were largely developed by Pennsylvanians who brought their traditions with them. The other contracts upon tracts of land included in this 6,000 acres owned by the company, are substantially the same in form as this Cletus lease; the only substantial difference would be the royalty rates; although there may be a good deal of difference in the wording, but they all go through in the same way and I would say the Cletus lease is a typical form. I am not quite sure whether the Cletus lease provides for mining of seams of coal subsequently discovered and not known at the time the contract was made, but later contracts so provided, and some of them pro- (103) vided that if additional seams of coal other than that being mined or developed at the time, were discovered, the operator would have the right to operate those additional seams, provided he did so within a certain specified time. The lease fixed a minimum rate per ton in the contract to be paid by the operator, and specific rates for the mining of coal in additional seams were to be determined at a later time.

The parties stipulate said Cletus lease shall be con-

sidered as the typical instrument or contract upon the legal issue of whether or not a sale of coal in place was accomplished under the several instruments or leases acquired by the Bankers Pocahontas Coal Company.

The parties further stipulate the several deficiency letters of which copies are attached to the petitions of the Bankers Pocahontas Coal Company were duly received by said company, and showed the deficiencies therein (104) stated.

The parties further stipulate the gross income of the Bankers Pocahontas Coal Company for each of the several years in controversy was derived from payments made under the several contracts upon its land in reference to the coal content of same, excepting any items otherwise appearing in the original returns filed herein, and that in any computation under Rule 50, said returns may be used as though offered in evidence in this proceeding.

The returns of the company were made on the basis of money actually received; that is, a cash receipts and disbursement basis.

CROSS EXAMINATION

State and county taxes against the property are assessed against the Bankers Company, and the operating companies are billed for the taxes based upon the acreage controlled by them. I do not believe we have failed to get any taxes at all, except from one company last year, 1928. The Bankers Company at all times followed (105) the general custom of protecting its interest by seeing that taxes were paid on the property, as they owned the land and had to pay the taxes.

RE-DIRECT EXAMINATION

The 1928 item of taxes not repaid to the Bankers Company still remains unpaid.

Re-Cross Examination

The Bankers Company acquired this contract of about 6,200 acres in 1911, and the deed to the company was made in July, 1912. When the deed passed the title of properties to the company, these operating contracts were already in existence, and riding the property so to speak, and had been in existence since 1901, 1902 and 1903. The Bankers took the property, plus the contracts, and there was a subsequent formal re-assignment of the contracts and acquisition of them by the Bankers Company in its own name.

Witness being asked by respondent's attorney for the consideration paid for its land by the Bankers Company, and having answered he could give a pretty good esti-
(106) mate, attorney for the petitioner objected that only the legal nature of the contract is involved, and cost is not material, and that no issue in the case goes beyond the basic date of March 1, 1913. The Board member overruled the objection and granted an exception to the petitioner from said ruling.

My recollection is a bond issue was outstanding on the property at that time of either $240,000 or $260,000. We paid out $60,000 in cash. There were some title troubles and we paid on that, considering that the stock at par, $35,000, and we lost, to straighten these titles out to the Standard Pocahontas Coal Company, 600 acres of coal, which we valued anywhere from $50,000 to $150,000. We settled two or three other claims of about $2,000 or more. I consider all these items to be consideration approximately given by the Bankers Company for the acquisition of this plot of 6,200 acres.

Thereupon, petitioner's attorney moved to exclude and strike out the answer of witness on the same grounds
(107) offered as objections to same, and the Board member denied said motion to strike.

Re-Direct Examination

In 1923 the Bankers Coal Company sued A. B. White,

Collector, in a District Court of the United States for West Virginia, for the recovery of income and profits taxes for the years 1914 to 1919 inclusive. In that action a contention was made concerning the amount allowable as a depletion unit. The action was tried upon a stipulation of facts and evidence of each party as to the valuation of the property and the determination of the depletion Unit. In deciding the case, the Court made a decision upon the question of the value of the property and the depletion unit, and a judgment was entered pursuant to its opinion, which judgment was subsequently paid. In said action the Bankers Pocahontas Coal Company sued in its own right, and is the petitioner in these proceedings. The subject matter involved related to depletion value under the provisions of Revenue Acts concerning income and profits taxes for the several years involved. Said depletion unit had reference to the same 6,200 acres involved in this proceeding. The same parties and the same subject matter were before the United States Court as appear in this proceeding, excepting (108) the Collector was the party defendant there, and in this proceeding the Commissioner is the respondent.

I have here a copy of the record in the West Virginia proceeding, attested as required by the Acts of Congress, and I identify and offer same in evidence, the record being marked "Petitioner's Exhibit 1," and the judgment in said proceeding being marked "Petitioner's Exhibit No. 2" for identification.

Thereupon, respondent's attorney stated any objection to the acceptance of said exhibits in evidence on the issue of res adjudicata is withdrawn, but objection is made to the utilization of the material, affidavits, Revenue Agents' reports, etc., appearing in the record as proof of specific facts in the case.

Thereupon, the presiding member received said exhibits as being certified copies of Court records that do not bind the Board to any doctrine of res adjudicata.

A summary of Petitioner's Exhibit No. 1, being the (109) record in the action styled No. 868, Bankers Pocahontas Coal Company, vs. Albert B. White, Collector of Internal Revenue in the District Court of the United

States for the Southern District of West Virginia, omitting praecipe, summons, and similar incidental matters, is as follows:

"1. Declaration filed February 21, 1923, in the Northern District at Parkersburg, West Virginia, claims the recovery from defendant of $6,267.08, being additional income and profits taxes for the years 1914 to 1919, inclusive, alleged to have been erroneously and illegally assessed against and collected from the plaintiff corporation, and which were paid under protest by said plaintiff on August 17, 1921, and for which a claim for refund was filed and rejected by the Bureau of Internal Revenue on or about April 5, 1922. To said declaration was attached a statement of account including, as part of same, Departmental letter of March 8, 1921 from the Commissioner of Internal Revenue, in which the adjustments relating to the tax determination for each year were specifically stated, including a determination that the depletion allowed is based upon a rate of 3.6c a ton mined as computed upon data submitted by plaintiff to said Bu-
(110) reau.

2. Consent order of September 3, 1923, transferring said case to the Southern District of West Virginia for trial, with transmittal of all original papers and a copy of said order to the Clerk of the District Court of the Southern District of West Virginia for further proceedings.

3. Consent order by attorneys for plaintiff and the District Attorney of the United States for said Southern District of West Virginia and by the special attorney for the Bureau of Internal Revenue, representing the defendant, agreeing to the jurisdiction of the United States District Court for the Southern District of West Virginia, and entering the appearances of their respective clients; said order further grants leave to the defendant to file its plea in writing, and same being filed, the plaintiff replied generally thereto; defendant having further pleaded the obligations set out in the plaintiff's declaration were not assumed or undertaken by defendant, and the parties having put themselves upon the country, and issues being thereupon joined, the parties tendered an

agreed statement of fact and other evidence, including deeds, coal contracts, engineering reports, deficiency letters, tax returns, protests and other writings, and all of (111) same were ordered filed and made part of the record herein, as the evidence in the case, and the parties being heard, time was taken by the Court for consideration of its judgment.

4. Agreed statement of fact that plaintiff corporation was organized in 1912 in West Virginia and by deed of July 19, 1912 acquired approximately 6,000 acres of West Virginia coal land for good and valuable considerations not specifically described in the deed of conveyance, and which lands were and are of practically no value excepting as to the coal content; said lands before March 1, 1913, were disposed of by several written instruments providing for payments of annual minimum amounts and a fixed payment per ton as to the respective acreage parcels, which writings were made by predecessors in title of the plaintiff, and all interest and benefits of which were paid to plaintiff by its deed of conveyance and otherwise; that when said written instruments were made the party known as lessees therein, took actual possession of the respective properties and continued to mine coal therefrom, and said parties, their successors and assigns have been continuously in said possession and mining, removal, and sale of the coal in said properties, (112) and are now so doing and paying to plaintiff the sums provided for in said writings; that since its organization the plaintiff has had no business, excepting the receipt of payments under said writings and distribution thereof to its stockholders, and all sums of money coming to plaintiff from any source, are those called for in said writings; that as of December 31, 1917, representatives of the Bureau of Internal Revenue examined plaintiff's property, books and records, and gave to plaintiff a report based thereon, as a basis for computing income and profits taxes, and thereafter, on June 18, 1918 said representative submitted a detailed report in pursuance of said examination; said 1917 report determined the 6,000 acres of plaintiff on March 1, 1913, had an estimated value, computed as 20,000,000 tons of coal at 5c per ton, or $1,000,000, and that the depletion reserve upon 1,517,435 tons removed in 1913 to 1917, inclusive,

at 5c per ton amounted to $75,871.75, and using said determination computed additional taxes to be due from plaintiff for the years 1914 to 1917 inclusive, of $379.17; said report of June, 1918, included detailed explanation of said preliminary findings, and that the estimated coal content of March 1, 1913 was conservatively determined in June, 1915 by a mining engineer representing third (113) parties; that if transmittal of said Departmental report of 1918 to the Commissioner of Internal Revenue, and review thereof, plaintiff was advised additional taxes were proposed for the years 1914 to 1918 inclusive of $2,-728.45, therein, depletion was allowed upon a rate of 3.6c per ton mined, as computed upon data submitted by plaintiff and said additional taxes so ascertained, were assessed against plaintiff for the several years; that plaintiff, as the result of conference with the Department in May, 1920, was requested to and did file with the Department its protest; that the valuation of said property by the Department to be $1,000,000 as of March 1, 1913 was reasonably correct, and that the payments under the written contracts of plaintiff were the proceeds of sales of coal in place consummated before March 1, 1913; the Departmental estimate of recoverable tonnage was insufficient, and the Departmental value of $510,000 at 3.6c per ton mined was not commensurate with the value of the properties or of similar property as known on March 1, 1913; that as the result of said protest, another Departmental investigation and report was made in verification in October, 1920, and which report referred to Departmental failure to value coal seams below water level, and that such seams required valuation, because (114) same were being mined; that thereupon, in March, 1921, the Department recomputed the taxes of plaintiff for the years 1914 to 1919, to be $6,267.08, instead of amounts previously proposed, and plaintiff protested said additional taxes and the valuation findings, used as the basis of the Departmental rate of 3.6c-per ton mined; that the several original tax returns of plaintiff for the years 1914 to 1919 inclusive, were exhibited as part of said agreed statement; that the Departmental determination of the March 1, 1913 value of plaintiff's coal property included consideration of data and reports as follows: Form B-MMS in reference to adjustment of invested capital by establishment of a paid-in surplus as

existing; Form A-MMS, being depletion schedule for 1909-1917; Strother and Hughes statement of March, 1919, giving history of plaintiff and summarizing valuation reports of various engineers made in the years 1907 to 1917, inclusive; engineer Doe's report of 1907, describing property, coal seams and conditions, operations, costs, sales and facilities; engineer Merrill's report of August 22, 1919, upon the same subjects, and ascertaining estimated content of 66,838,000 gross tons, of which 90% would be recovered through good mining practice; en-
(115) gineer Buck's report of June 23, 1915, covering said subjects and indicating royalty receipts for 25 years of $1,400,000 upon a 90% recovery basis; Engineer Hanlon's report of September 22, 1908 covering the same matters; that in reply to plaintiff's protest of March, 1921, against additional assessment of $6,267.08, on June 3, 1921, the Department affirmed its previous position that the evidence submitted was practically the same as previously considered, and justified no change in valuation, and further stated the sale of coal in place ruling was inapplicable for purposes of the Federal income tax; that said additional taxes were paid under protest of September, 1921, and a claim for refund thereof was filed; that the Departmental determination of depletion to be 3.6c per ton, consisted of conclusions as follows:

"1. It is desired to determine the value of the recoverable coal as of March 1, 1913.

2. This company sets up that on July 16, 1912, it acquired 6,138 acres of coal land, assuming a mortgage of $300,000.00 and litigation costs of approximately $150,000.00, or at a total cost of approximately $450,000.00; (116) which land was assessed at $156,392.00. The company is a coal land lessor having 5 operating coal lessees, with an average royalty of 8½ cents per ton, and a minimum of $33,000.00 per year. As of March 1, 1913, they claim 20,000,000 tons of recoverable coal valued at $1,000,000.00 with a 5 cent rate of depletion, endeavoring to substantiate their claim by 3 appraisals widely differing both in values and tonnage.

3. The lessees were operating when the purchase was made, that from 1909 to 1916, inclusive, the average an-

nual tonnage was 290,000 tons; yielding an income of $32,000.00, and even in 1917 the annual tonnage was but 360,000 tons, income $32,000.00, in no cases equal to the minimum royalty; that adjoining land (including the (117) coal) sold for $100.00 per acre, and that the showings both prior to and after March 1, 1913 do not tend to enhance the value of the coal.

The property carried 4 seams of coal; 2—Pocahontas No. 3 and No. 4 which are 300′ below water level, not worked on the property here, only a prospective value and both of these seams are diminished in thickness from 11 to 4½′ (with a band of 6′ slate) as they approach this property. No valuation of them is here made.

The No. 6 and No. 7 seams spoken of as the "Pocahontas thin vein" are both worked on the property. They vary from 30″ to 4½′, including the parting from 2″ to 6″, are about 200′ above the railroad, and underlay some 4,000 acres, but are so irregular and distributed that both are not uniformly worked, and a total of 14,000,000 tons (118) of recoverable coal is believed fair.

Therefore, taking the 14,000,000 tons recoverable coal; average annual tonnage of 350,000; an average annual income therefrom of $34,000.; a life of 40 years, we have a value of the recoverable coal of $510,000., or $.036 per ton.

4. It is therefore recommended that the rate of deple- (119) tion be fixed at $.036 per ton."

that the refund claim of plaintiff was rejected by the Commissioner; that Treasury decisions 2746 and 3107, and Article No. 244(d) and (e) of Regulations 62 be read in evidence; that the defendant Collector resides in, and has his office in the Northern judicial district of West Virginia, and the money sued for be paid for him as such Collector; that all profits and gains of plaintiff, and increases in the value of its property, arise by and through said instruments of writing; that objection by plaintiff to Treasury Decisions 2746 and 3107 are reserved as being of no probative force as evidence; that all exhibits filed with said statement may be considered as evidence

to determine any and all questions, the Court giving to any such paper such probative weight as if the writer thereof were under oath and testifying to same, and give to such evidence the weight he may think it entitled to.

5. Opinion by the Court:

This is an action at law to recover $6267.08 from the Collector claimed as a payment erroneously and illegally assessed and collected from the plaintiff.

It covers a period of six years, from 1914 to 1919 in-
(120) clusive.

All the necessary preliminary actions were taken by the plaintiff, and the action was properly brought.

The plaintiff is the owner of about six thousand acres of land, claimed to be underlaid with seams of coal, situate in McDowell County, West Virginia. This land was purchased in July 1912. Sundry coal leases covered the entire acreage at the time of purchase. Therefore, all that the plaintiff purchased, was the reserved rentals and royalties, as set out in the various coal leases. These varied. Some were for ten cents per ton, some for eight cents, some for seven cents, and one was for five cents. It is agreed that the land has no value, other than its coal.

This brings on the first contention of the plaintiff, that is, that the plaintiff, by the reserved rentals and royalties, is being paid for the land and the coal there-
(121) under, and that such rentals and royalties are not "income" but "purchase money".

Personally, I believe this statement to be true, but I cannot, in the face of all the decisions, sustain it here. I therefore hold, that the royalty payments are income, and should pay a tax as such.

Other items are in dispute in this case, and they will be taken up.

1st. The lessees of the plaintiff agreed, each for itself, to pay the state, county and district taxes assessed upon the land as described in each lease, and the plaintiff was thus wholly released from the payment of any such taxes. The payment thereof by the lessees, was a part of the purchase price of the coal, in addition to the

amount per ton, for all coal mined by each lessee. However, under the tax laws of West Virginia, the land was (122) charged to the plaintiff, and the collecting officer looked alone to the plaintiff for the payment of such taxes. In order to protect its property, and properly distribute the amount to be paid by each lessee, it was necessary that the plaintiff pay to the sheriff such taxes in bulk, and then collect from each lessee his distributive share thereof. These taxes have no place in the income tax accounts, unless lessee failed to reimburse the plaintiff, for the amount so advanced for it. In that event, such amount would be either a tax paid, for which the plaintiff would be entitled to a deduction as such, or it would be a lost debt, charged off, and in either event, the final result would be the same. The returns are somewhat confusing, because the taxes are credited as a deduction, and when repaid, are charged as income. From the proofs here, I cannot decide the exact state of the account thereof.

2nd. The value of the property as of March 1st, (123) 1913.

The valuation department of the office of the Commissioner values it as of the value of $510,000.00, and fixed the value of the depletion at $.036 per ton. After considering the proofs herein on that subject, and drawing the conclusions therefrom, in the light of forty years experience in observing such things in Southern West Virginia, I am of opinion, and hold, that the property has more tonnage of recoverable coal than has been allowed, although I do not believe that any lessee will ever recover ninety per cent of a coal seam.

I am of opinion that the depletion value should be at the lease five cents per ton, and that all the returns should be made on that basis.

3rd. I am unable to agree that attorneys fees paid by the plaintiff, are part of the capital account, and hold (124) that they are expenses, and should be allowed as such.

4th. Interest paid on debts, should be allowed as a deduction, and where plaintiff was primarily responsible,

and paid interest on a bonded indebtedness, it had the duty to pay it, and if any part thereof was not collected or collectible from the other party, then such interest, so paid, was a proper deduction.

5th. Under the head of expenses, I am at a loss what to take as correct.

Plaintiff by its president and secretary, make returns for these six years, and these officers, both well known to the court as men of probity and ability, swear to the correctness thereof. An agent or two comes along and says that certain amounts of expenses should be disallowed. In most instances here, there is no satisfactory explanation for such action, and no reason is given.

As the case stands here, I will accept the return of (125) expenses, and will allow the same, unless it affirmatively appears what such expense is, and it then shall appear improper.

From what has been said, I leave it to the counsel for the plaintiff and defendant, to draw a proper judgment in this action.

6. Tax recomputation pursuant to memorandum opinion, allowing depletion at the rate of 5¢ per ton, and including recapitulation of correct tax liability in comparison with taxes paid for the several years, and the resulting amounts of recoverable taxes and interest in said total recovery of $5,373.01.

7. Judgment, September 21, 1927.

This day came the parties hereto, by counsel, and the parties having agreed upon the facts, as set forth in (126) the order of this court, entered on October 10, 1923; and, trial by jury having been waived; and, the matters of law and fact having been submitted to the finding of the court, in lieu of a jury; and, the court having heard the argument of counsel—on briefs and orally—for the parties respectively; and, having maturely considered of his ruling and judgment herein; this day filed and made part of the record herein his opinion in writing. Whereupon in accordance with the terms and tenor of the written opinion of the court, the

court doth find that the defendant is indebted to the plaintiff, on account of excess taxes paid by the plaintiff to the defendant for the years 1914 to 1919; both inclusive, in the declaration mentioned, in the sum of $5,373.01, and doth assess the plaintiff's damages accordingly.

(127) WHEREUPON, IT IS ADJUDGED, ORDERED AND DIRECTED that the plaintiff do recover of and from the defendant, the sum of Fifty-three Hundred and Seventy-three and 1/100 (5,373.01) Dollars, with legal interest thereon from this date until paid, together with costs, to be taxed by the Clerk of this court, to the ruling of the Court in his findings herein and in entering judgment for the plaintiff the defendant at the time excepted.

The defendant announcing a desire to apply to the Circuit Court of Appeals for a writ of error and supersedeas to the judgment of the Court herein a stay of ninety days from the adjournment of the Court is granted for that purpose.

(128) In Appeal 42664 for the year 1924, the Bankers Company objects to an addition to income subject to a depletion adjustment, and arising out of receipt of a judgment against the Flanagan Coal Company. The Flanagan Coal Company owned an adjoining piece of land to our land, and we discovered they had mined across our boundary line in a particular seam of coal. I took up the question with them, and they first said they would pay for it. The matter hung fire for some months. This was in 1920 when they had gone in there, and at that time the price of coal was very high, any where from $6 to $15 a ton. They did not pay, and when I got my engineers to go down to measure the coal that had been taken out, the engineers found the Flanagan people had shot entries and we could not get in at all. I brought a suit for damages to the property, and we eventually settled it. We got $3,770 in 1924 for damage to our property, and that seam of coal, my engineers and I figured as at least $10,000, because the method of going in on that side of the hill had been absolutely destroyed. The amount so received has no relation to royalties or contract payments, and has no relation to extraction of

15,000 tons of coal or any amount. This was purely an arbitrary settlement adjustment. The statement of the deficiency letter that for income tax purposes the (129) amount of damages received has the status of royalties and that depletion is allowed on 15,000 tons estimated to have been damaged, is not correct, as we had no contracts with the Flanagan Coal Company.

CROSS EXAMINATION

The Flanagan Coal Company mined this coal I think in 1920, and we discovered they had gotten into our coal in probably two or three years afterwards. Damage suit was brought against the Flanagan Company, but we did not go to trial as it was settled before hearing between the attorneys or owners. The suit was for the recovery of value of the coal taken out, plus damages to the plant. I attended the conferences leading to the settlement, and none of us knew the amount of coal that had been taken out. We claimed damages considerably in excess of the settlement figure, but the Flanagan Coal Company at that time was in a pretty precarious financial condition, and we figured every little bit would help and get as much as we could. It appeared advisable to us to accept the settlement which they proposed. The coal mined by the Flanagan Company was subject to these lease contracts in one way, and in another way it was not. It was within the land area covered by the Vaughn Coal and Coke Company lease. The Commissioner has (130) allowed the Bankers Company a depletion upon an estimated amount of 15,000 tons of coal mined out by the Flanagan Company at the depletion rate applied by the Commissioner.

After hearing the parties on the question of the presentation of the Court record by petitioner as evidence of res adjudicata, the Board ruled:

"The Board some time ago had occasion to consider the weight to be given to the doctrine of res adjudicata. In most cases the argument for same has been made by respondent. For example, a property value as of March 1, 1913 was found in relation to the year 1917 and the taxpayer claimed the decision was based on inade-

quate evidence with the result that the Board received additional evidence and in many cases has given relief. The Courts have declared in many cases the determination of the Commissioner as to deficiencies are prima facie correct. In the instant case the District Court de-
(131) cision is most persuasive, but is certainly not decisive of the issues, and I must rule against the proposition of petitioner that it is decisive of this case. The most the Board can do concerning this Court decision and record is that it is possibly persuasive of a proper depletion rate, but is not decisive nor conclusive of same, and that is the ruling."

An exception to petitioner was subsequently granted by the Board from this ruling.

Respondent's attorney: The respondent has not rested upon this issue of depletion, and although the ruling of the Board has been anticipated to be as just given, respondent desires to back up the ruling by the record and to indicate further reasons why res adjudicata does not exist in the case of a depletion allowance, and desires to call Judge Strother as a witness for respondent.

Petitioner's attorney: The presentation of this
(132) record raises the question whether it is conclusive as res adjudicata, or merely sufficient to establish a prima facie case. As you have ruled on the issue of res adjudicata, petitioner asks your ruling whether a prima facie case is thereby established, and shifts the burden to the respondent, and probably respondent's attorney will want to be heard on that question.

Respondent's attorney: If petitioner's attorney insists on such ruling, it is only fair that you hear evidence from Judge Strother, which may be of material aid in passing on the question, and will be addressed entirely to the application of this Court decision to the pending appeals.

Judge Strother called as a witness for respondent testified as follows:

In 1913 Lease No. 1 was under contract to the Vaughn (133) Coal and Coke Company, which is still the operator under that contract so far as the Bankers Company is concerned, although the Vaughn Company subleased to the Fall River Pocahontas Colleries Company in 1916 and 1917. Lease No. 2 was operated by the Superior Pocahontas Coal Company in 1913 and is so operated at this time. In 1913 the New Pocahontas Coal Company operated Lease No. 3, and they have passed that lease along to the Monarch Smokeless Coal Company with which the Bankers Company has no contractual relation. In 1913 the Oregon Coal and Coke Company operated Lease No. 4 and was succeeded by the Solvay Colleries Company which is now known as the Kingston Pocahontas Company. The Oregon Company operated from 1909 to 1916 and the Solvay Company from 1916 to 1924, and the Kingston Company has since operated the property. Before January 1, 1923 the New Pocahontas Coal Company contract provided for a royalty per ton at 7c, and thereafter provision for 8c per ton was made. A mistake was made in the acreage at the time the contract was made, and probably 100 acres were omitted, and when it was agreed this acreage should also be operated, the rate was increased from 7c to 8c per ton. As to Lease No. 5, the original operator (134) was the Pocahontas Smokeless Coal Company, which was subsequently acquired by the New Pocahontas Coal Company, and so far as the Bankers Company is concerned, there has never been any change. When a sublessee takes over one of these properties, I do not think the original lease requires the approval of the Bankers Pocahontas Coal Company, but that question has given us considerable concern. There is no restriction in any of these contracts, and it has been assumed that the right exists to sublet without the consent of the Bankers Company. Prior to March 1, 1913 the Bankers Company had entered into so-called leases with respect to particular seams of coal. For example, the Oregon Coal Company's contract covered between 1,700 and 1,800 acres, including all seams of coal. A conditional provision of the lease required the operator to mine the coal in other seams than the one being mined at a royalty not exceeding 10c per ton, and unless such operation was begun within six months, the right might be let by

the owner to someone else. In that way, in 1916 the Kingston Pocahontas Coal Company came in and began to mine such a seam of coal. Lease No. 6 to the J. B. B. Coal Company was not operated by a different company thereafter; although the Dexcar Coal Company and (135) later the Fordson Coal Company had something to do with the lease. I assume the J. B. B. Coal Company is responsible, but the payments come from Mr. Ford, and that is entirely satisfactory at this time. The Bankers Company never approved the lease to the Fordson Company, as it was purely a stock proposition. Since 1913 there have been times when some of these lessees ran into thin coal or unminable coal, and where there were pinch-outs, or the coal could not be mined, but there has always been continuous mining of the coal.

CROSS EXAMINATION

The transactions including assignments or changes in the several lease contracts occurred in the years 1916, 1918 and 1923. The 1923 change of the contract occurred in January, and before February 17, 1923, when suit was filed in the District Court of the United States, by the Bankers Company. Since February 17, 1923, there has been no change or alterations in the terms or conditions of the old contracts, and there have been no new contracts made as to the property. The deficiency letter for 1920 issued on February 15, 1926. The deficiency letter for 1921 to 1923 inclusive issued on February 12, 1926. The deficiency letter for 1924 to 1926 in-(136) clusive, issued on January 15, 1929. The judgment in the United States Court proceeding is dated January 31, 1928, and consequently, the last deficiency letter was issued about a year after the judgment. The deficiency letter of January 15, 1929 shows a protest was made in December, 1927. A brief was filed in November, 1928 and a conference was held on December 12, 1928. In those papers and conferences reference was made to the findings of the United States District Court, which involved the years 1914 to 1919 inclusive. In the several deficiency letters, respondent used the depletion rate of .036, which was used in the tax determination for the previous years on which suit was brought. No change was made from the rate determined and applied

in the earlier years. That rate was based on a value of $510,000 by a valuation engineer, who said we had no No. 3 and No. 4 seams of coal in our property, although we were mining that coal at that time. The valuation was made by Mr. Atkinson in about 1916. The rate of .036 was a blanket rate applied to the company as a whole and to all its leases.

The parties stipulated and agreed that a rate of .036 was applied by respondent in his determination in the (137) several deficiency letters, both before and after the Court judgment.

Thereupon, petitioner moved to strike out the evidence of Strother for respondent, relating to impeachment of the Court record on the ground same cannot be impeached as an estoppel of judgment. The motion was denied and exception granted to petitioner.

The Member: Petitioner's attorney will please state the purpose for which Exhibits 1 and 2 were offered, bearing in mind the ruling that the Board will not be bound by the conclusions of the Court decision as to a proper rate for depletion.

Petitioner's attorney: Petitioner offers this judgment in evidence, and this record in evidence. The judgment is offered for the reasons I have given before, and the entire record is offered in evidence upon the issues of (138) this case insofar as applicable.

Respondent's attorney: Respondent objects on the ground that no rule of law allows a petitioner to borrow a record in some other Court of jurisdiction where the rules or the question may or may not have been the same; where the same cause of action was not involved because a different law was involved, and I see no greater force to this record than could be given by this Board to an affidavit without the parties present for examination.

The Member: The objection is overruled. The Board rules all the proof before the District Court, included in Exhibit 1, is before the Board to enable the Board to determine a proper depletion rate. Such rul-

ing does not mean the Board feels bound to accept the rate found by the Judge, and only means the competent evidence that was before the Department and included in (139) this exhibit will be considered for the purpose of determining proper depletion rates for the years in question in these proceedings. An exception is granted to the respondent and also to petitioner to so much of the ruling as states the conclusions are not considered binding upon the Board.

D. J. F. Strother, recalled for petitioner, testified as follows:

I desire to correct my previous testimony concerning cost of the Bankers property when acquired, by adding that in 1911 I made its owner a proposition and gave him a year to redeem the property. He did not make good and we took the property over at what I considered less than 50% of its value. The proposition related to some money which he owed to me and to banks with which I was connected. For this reason we did not meet from 1911 until the organization of our company in 1912.

It is stipulated the decision of the Bankers Pocahontas (140) Coal Company appeal as to the issues of coal in place, or the alternative issue of depletion value shall apply to those questions as arising in the appeals of Judge Strother.

Respondent's attorney: If the Board decides the theory of sale of coal in place is not applicable to these contracts, and the income derived from rental or royalty is subject to income taxation, its attention must turn to determination of a proper deduction from income as a depletion reserve, and to any payments of dividends out of that reserve to the stockholders, and in these respects this record fails to provide the Board with the facts on which it can determine same.

This record lacks several vital elements necessary to determination of appropriate depletion. We do not have (141) the production figure for any year, by which the rate is to be multiplied to produce the deduction; we

have no figures indicative of opinion as to how much coal was in the property; as to what would be a proper discount rate for valuation of a lessor's interest on March 1, 1913.

Upon the question of facts necessary to any computation under Rule 50 herein, the parties stipulate the following may be received, by agreement, as a statement of fact:

(Reference is made to figures shown in Board findings of fact as part hereof).

Schedule 1—Contracts of March 1, 1913—(figures omitted here because shown in Board findings of fact.)

Schedule 2—Estimated recoverable tonnage of March 1, 1913—(figures omitted here because shown in Board findings of fact.)

Schedule 3—Tonnage mined and contract payment each year—(figures for 1920 and later years omitted here because shown in Board findings of fact.)

Lease No. 1—Fall River Pocahontas Collieries Company

Year	Tonnage Mined	Paid for	Receipts
1908	986	1225	$ 98.64
1909	6152	6912	553.58
1910	25539	25537	2043.08
1911	27283	27275	2182.61
1912	20455	19525	1562.46
1913(11 months)	18404	15500	1240.62
1914(10 months)	31497	30237	2419.82
1915(10 months)	40698	71362	5709.26
1916	63048	77050	6164.67
1917	70929	69475	5558.59
1918	86025	85012	6801.99
1919	83778	83775	6702.25

Lease No. 2—Superior Pocahontas Coal Company

(143)

Blackstone Mine

Year	Tonnage Mined and Paid for	Royalty
1908	21690	$2169.03
1909	126969	12693.33
1910	93706	9370.66
1911	102033	10203.26
1912	60556	6055.60
1913	54108	5411.02
1914	47211	4721.39
1915	42804	4280.49
1916	26165	2616.54
1917	14151	1415.11

Cletus Mine

Year	Tonnage Mined	Tonnage Paid for	Royalty
1908	1606	1606	$160.62
1909	11627	11628	1162.79
1910	15802	15803	1580.33
1911	27689	27689	2768.91
1912	24169	24170	2416.97
1913	31714	31718	3171.76
1914	42088	42193	4219.27

Lease No. 2—Superior Pocahontas Coal Co. (Continued)

(144)

Cletus Mine

Year	Tonnage Mined	Tons Paid for	Royalty
1915	55469	55469	$5546.98
1916	48849	48850	4884.93
1917	49959	49960	4995.96
1918	59935	99999	9999.96
1919	55802	100000	10000.00

Lease No. 3—Pando Coal Company

Year	Tonnage Mined	Tonnage Paid for	Royalty
1908	5951	5951.	$595.13
1909	40040	40040.	4004.02
1910	34101	34103.	3410.36
1911	34044	4434.	443.44
1912	3807	15972.	1597.28
1913	-----	50818.	5081.89
1914	-----	22497.	2249.78

Note: Payments in 1912, 1913 and 1914 were made by Receivers for the Pando Coal Company. After September 16, 1912 this mine was operated by the New Pocahontas (145) Coal Company.

Atlas Coal Company

Year	Tonnage Mined	Tonnage Paid for	Royalty
1908	4139	4139.	$413.97
1909	29282	23413.	2341.33
1910	21013	1827.	182.78
1911	-----	-----	------
1912	-----	22500.	2250.00

Note: The payment of $2250.00 in 1912 was realized from sale of the property to C. C. Huffman, et al. This mine was operated by New Pocahontas Coal Company after September 16, 1912.

W. E. Deegans

Later New Pocahontas Coal Company and Monarch Smokeless Coal Company

Year	Tonnage Mined	Tonnage Paid for		Royalty
1912	1685	477.8	.07c	$349.90
1913	30558	57142.7	.07c	4000.00
1914	25974	57142.7	.07c	4000.00
1915	66144	66145.0	.07c	4630.15
1916	91538	91538	.07c	6407.66
1917	92577	127.018	.07c	8891.25
1918	135941	117.141	.07c	8891.88
1919	128770	119611	.07c	8199.88

Lease No. 4—Oregon Coal Company, Later Solvay Collieries Company and Kingston Pocahontas Coal Company.

(146) Warwick Mine—Upper Seam

Year	Tonnage Mined	Tonnage Paid for	Receipts
1908	18850	18853.	$1885.30
1909	95889	95889.	9588.98
1910	93710	93170.	9317.06
1911	107542	107542.	10754.26
1912	85885	85885.	8588.56
1913	75847	100000.	10000.00
1914	81032	100000.	10000.00
1915	73993	100000.	10000.00
1916	99418	99419.	9941.91
1917	85124	100230.	10023.00
1918	82014	100005.	10000.54
1919	75552	100000.	10000.00

Exeter Mine—Lower Seam

Year	Tonnage Mined	Tonnage Paid for	Receipts
1919	-----	75000.	$7500.00

Lease No. 5—Pocahontas Smokeless Coal Company Later
(147) Central Pocahontas Coal Co.

Year	Tonnage Mined	Tonnage Paid for	Royalty
1908 (Dec.)	3,266	3266	$163.30
1909	23,340	23340	1167.00
1910	46,592	46918	2345.90
1911	48,934	48934	2446.70
1912	52,319	52487	2624.35
1913	41,282	40722	2036.10
1914	34,067	34067	1703.35
1915	48,464	34090	2704.50
1916	60,670	54505	2725.25
1917	56,985	56981	2249.07
1918	9,133	9135	456.65
1919	-----	-----	------

Lease No. 6—Hensley Coal Company.

Later known successively as J. B. B. Coal Company, Dexcar Pocahontas Coal Company and Fordson Coal Co. The payment of 1c per ton ($300.00) minimum per year) is a haulage fee for use of an easement over Bankers Po-
(148) cahontas property to coal mined on other properties by the operators.

Year	Tonnage Mined	Tonnage Paid for	Receipts
1908	6908	6908	$69.08
1909	29950	29951	299.51
1910	43822	43825	428.25
1911	82062	86330	863.30
1912	86758	96759	967.59
1913	74950	74952	749.52
1914	98128	98129	981.29
1915	170034	169938	1699.28
1916	113647	112864	1128.64
1917	67893	67893	678.93
1918	49610	49610	496.10
1919	90729	90729	907.29

Thereupon, both petitioner and respondent rested.

Each party having tendered separate proposals of
(149) settlement under Rule 50, the following proceedings were had at a hearing before Hon. C. P. Smith, member, on June 18, 1930;

Counsel for respondent stated that the parties were in disagreement as to the methods of computing the tax; that in the respondent's computation depletion allowances were computed at the rate of 3.6c per ton upon tonnage mined each year; that this method was in accordance with the opinion of the Board in this case, and consistent with the Board's rulings in other cases, although the respondent in other cases was committed to the principle of allowing depletion on tonnage of coal paid for instead of upon tonnage of coal actually mined in a taxable year.

Counsel for petitioner stated that respondent's computations were in accordance with the Board's findings of (150) fact and opinion as they now stand but contended the Board's findings and opinion should be amended and supplemented, and the depletion allowances should be upon the basis of coal paid for.

The counter proposals for petitioner include a motion for amended and supplemental findings of fact and a reopening of the case on the grounds that the Board findings should be amended to allow depletion on coal paid for instead of upon coal mined in any year, and that the proposal of petition should be accepted as correct.

Petitioner urged a reopening was necessary because the stipulation of record and finding of the Board that a Depletion rate of 3.6c per ton was applied by respondent to all the years was evidently an error, as it appeared (151) other depletion rates were applied by respondent for the years 1924, 1925 and 1926, and both parties were in agreement as to the manifest error of the stipulation in this respect. Respondent replied that conceding said error, respondent's proposed tax computation substantially corrected same by allowance of the larger depletion rate as found by the Board to tonnage mined in the several years, and that it was thereby unnecessary to reopen the case. It further appeared a previous motion of petitioner for reopening the case and for rehearing had been overruled by the Board, without hearing. Petitioner submitted that the stipulation of tonnage mined and paid for for the several years, submitted during the hearing for purposes of any subsequent Rule 50 settlement, showed that under several leases coal paid for in several years, substantially exceeded coal mined, and offered to introduce said leases to substantiate the schedules, and to (152) show said payment was the minimum royalty required to be paid under said leases. Petitioner proffered the contents of said leases to be respectively: Lease dated January 1, 1918 to the Superior Pocahontas Coal Company; and Lease dated September 30, 1916 to the Solvay Colleries Company; each reciting the pre-existence of contracts on March 1, 1913, and the subsequent adjustment and modification of same as to payments of a minimum royalty in each year, with leave at any subse-

quent time to take out the coal therefor paid for, and whereby payments were required to be made for 120,000 tons per year—although only about 50,000 tons were actually mined in the year. Petitioner further offered to identify and incorporate each of said leases as part of the record as the best avowal of their contents and provisions.

Respondent having waived objection to the form of (153) offer, and to consideration of the contents of the leases upon the propriety of reopening the case, but having objected to the competency, relevancy and materiality of each of said leases as new matter not receivable in a rule 50 settlement. The Board sustained said objection and refused to receive said leases, and granted exceptions from its rulings thereon to the petitioner.

Thereupon, the Board further ruled:

Petitioner's argument is really directed to a rehearing or re-argument, and does not seem to me proper argument under Rule 50. If the Board is to correct its opinion and findings of fact, it must order a rehearing or re-argument, and I am very glad to get this to help us and other members in considering the argument, but I cannot accept it as anything other than a motion or argu-(154) ment for reconsideration of the case. I will receive it at this time, and if the Board is to do anything it will have to re-order a re-hearing or re-argument. The case was set down for a Rule 50 settlement, and unless the Board is to order a re-argument or a rehearing, the notice of settlement proposed by respondent must be accepted. I will consider this argument, and if the Board thinks there should be a rehearing it will order same of its own motion. I see no occasion for setting this down for further hearing under Rule 50.

Approved and ordered filed this 14th day of July, 1931.

CHARLES P. SMITH,
Member.

AGREED PRAECIPE

(155) Filed July 14, 1931.

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket Nos. 14516, 14517, 42664

Commissioner of Internal Revenue,
Respondent.

The Clerk will please include the following in the record upon the petition of appellant for review of the proceedings of the Board in the above entitled appeals (consolidated) before the United States Circuit Court of Appeals for the Fourth Circuit.

1. Docket entries, stated as follows:

(a) As to appeals 14516-14517—

"The entries in both appeals are identical and as follows:"

(Insert all entries from one appeal)

(b) As to appeal 42664—

Entries through April 27, 1929, followed by:

"After this date the entries are identical with entries in Appeals 14516, 14517 as appearing herein."

2. Petitions, deficiency letters, amended petitions and (156) answers from Appeals 14517, 14516, 42664, as follows:

(a) Docket 14517, Petition and deficiency letter (Insert) followed by Statement:

"Cletus Lease exhibit omitted because same appears in Board findings."

Answer (Insert)

Amended petition (Insert)

(b) Docket 14516 Caption, followed by statement:

"The petition, amended petition, answer and Cletus Lease Exhibit herein are identical in substance with same in Appeal 14517, as affecting adjustments and deficiencies herein contested for the calendar years 1921, 1922 and 1923, excepting as to special incidental issues removed from controversy by the subsequent Board findings and opinion, and same are therefore here omitted, excepting the deficiency letter, which is as follows:"

Deficiency letter (Insert)

(c) Docket 42664 Caption, followed by statement:

"The petition, amended petition and answer herein are identical in substance with same in Appeal 14517, as affecting adjustments and deficiencies herein contested for the calendar years 1924, 1925 and 1926, and same are therefore here omitted, excepting Paragraph (h) thereof and the deficiency letter here appearing."

Paragraph (h) of Petition (Insert).

Deficiency letter (Insert).

3. Motion granted April 30, 1929, consolidating Ap-
(157) peals 14516, 14517, 42664, for hearing.

4. Board findings and opinion.

5. Petitioner's motion for rehearing and modification, (February 27, 1930).

6. Board order denying same (March 6, 1930).

7. Respondent's Rule 50 settlement proposal (March 31, 1930).

8. Petitioner's Rule 50 counter-proposal of settlement (May 21, 1930).

9. Boards order denying motion for rehearing and reargument (July 15, 1930), and Redetermination (July 16, 1930).

10. Board order amending findings and opinion (September 26, 1930).

11. Petition for review.

12. Statement of evidence.

13. Extensions of time; orders concerning record contents, not included in record.

14. This praecipe.

(s) CAMDEN R. McATEE,
(158) Attorney for Petitioner.

Copy hereof acknowledged; all objections waived and consent record be accordingly prepared.

(Signed) C. M. CHAREST,
Attorney for Respondent.

(159) **AGREED ORDER**

United States Circuit Court of Appeals for the Fourth Circuit

Bankers Pocahontas Coal Company, Petitioner,	(B. T. A. Docket Nos. 14516
vs.	14517
Commissioner of Internal Revenue, Respondent.	42664 Consolidated).

The parties herein by their attorneys, having moved the Court for leave by agreed praecipe to establish the record herein before the United States Board of Tax Appeals to be Certified for use in this Court as required by its rule as containing the complete record as to docket entries, pleadings and other proceedings of record in one of the above entitled appeals before said Board, and to establish said record in each of the other appeals as part thereof for use in this Court, complete as to matters pertaining entirely to either of said appeals, and by reference as to matters therein which are the same in substance or in identity as in said complete record, and to consider said three appeals consolidated for hearing herein, for cause, that said three appeals before said Board involved substantially the same subject matter, (160) pleadings, proceedings and issues, and were therein heard and decided as a consolidated case and from said decision a single petition for review of said decision has been taken to this Court, and for cause that said records, if established pursuant to the rule of this Court by preparation of a single record in each Board appeals, will be repetitions, confusing and unwieldy, which the parties seek to avoid; and said parties having further moved the Court for its order to the Clerk of said Board to certify to this Court before the hearing date of said petition for review, as a supplement to said record, original Exhibits 1 and 2 of petitioner, being certified photostat copy of a certain Court record from the United States District Court of West Virginia, and it appearing a synopsis of said Court record is included in the statement of evidence, to order that the printing of said supplemental Court record be not required; and said parties having further moved the Court that, upon filing of the petition for review and record herein and in a related petition for review of D. J. F. Strother in this Court same shall proceed, together as a consolidated case under the separate captions of said proceedings for purposes of briefs, hearing and decision.

And the Court being advised in the premises, it is thereupon considered and ordered:

That *sur* single petition for review filed by petitioner (161) herein before said Board and statement of evi-

dence thereon, the parties shall file with the Clerk of said Board their agreed praecipe to establish the record herein as including the complete record in one of said appeals, as required by rule of this Court, and as including matters from the other appeals pertinent thereto, without repetition of matters appearing in said complete record but with explanatory statements of the substance and reasons for said omissions, and that said three appeals be and the same are considered consolidated and subject to one petition for review and statement of evidence for purposes of said record and hearing in this Court, and that said Clerk of the Board be and he is authorized to certify said record made as herein provided, and that any rule of this Court to the contrary is expressly waived,

And it is further ordered that the Clerk of said Board do certify to this Court before the hearing date of said petition for review, original Exhibits 1 and 2 of petitioner, being certified photostat copy of a certain Court record from the United States District Court of West Virginia, as a supplement to the record herein provided for by this order, and that printing of same be not required.

And it is further ordered that upon filing in this Court of the petition for review and record herein and in a (162) related petition for review of D. J. F. Strother, that both shall proceed together herein, but under their separate captions, for purposes of briefs, hearing and decision.

July 8th, 1931.

JOHN J. PARKER,
United States Circuit Judge.

AGREED:

(Signed) CAMDEN R. McATEE,
Attorney for Petitioner.

(Signed) C. M. CHAREST,
Attorney for Respondent.

A true copy, Teste:—

CLAUDE M. DEAN,
Clerk United States Circuit Court of Appeals
Fourth Circuit.

Bankers Pocahontas Coal Co.,
Petitioner,

(163) v. Docket Nos. 14516, 14517 and 42664.

Respondent.

CERTIFICATE

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 162, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 28th day of July A. D., 1931.

B. D. GAMBLE,
Clerk.

(SEAL)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3215.

Bankers Pocahontas Coal Company, Petitioner.

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

July 29, 1931, the transcript of record is filed and the cause docketed.

Same day, three (3) joint motions to extend the time for the settlement of evidence, and the transmission of the record to this Court are filed.

Same day, order dated February 26, 1931, and signed by John J. Parker, U. S. Circuit Judge, extending the time for a pediod of sixty (60) days from and after March 3, 1931, within which to settle statement of evidence, prepare the record and transmit same to this Court, is filed.

Same day, order dated April 22, 1931, and signed by John J. Parker, U. S. Circuit Judge, extending the time for a further period of sixty (60) days in addition to sixty days from and after March 3, 1931, granted by order of February 26, 1931, within which to settle statement of evidence, prepare the record and transmit same to this Court, is filed.

Same day, order dated June 25, 1931, and signed by John J. Parker, U. S. Circuit Judge, extending the time for a further period of thirty (30) days in addition to the time granted by orders of February 26, 1931, and April 22, 1931, within which to settle statement of evidence, prepare the record and transmit same to this Court, is filed.

Same day, agreed motion as to the record is filed.

Same day, agreed order as to the record is filed.

Memo. of Clerk: This order is printed at page 113 of the transcript of record.

Same day, the appearance of Camden R. McAtee and Wells Goodykoontz is entered for the petitioner.

August 8, 1931, the appearance of G. A. Youngquist, Assistant Attorney General, Sewall Key, Special Assistant to the Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and D. M. Evans, Special Attorney, Bureau of Internal Revenue, is entered for the respondent.

September 5, 1931, twenty-five copies of the printed record are filed.

October 12, 1931, the originals of petitioner's exhibits numbers 1 and 2 are certified up to this Court.

October 17, 1931, the appearance of Andrew D. Sharpe, Special Assistant to the Attorney General, is entered for the respondent.

ARGUMENT OF CAUSE.

October 20, 1931 (October term, 1931,) cause came on to be heard, together with No. 3214, before Parker and Soper, Circuit Judges, and Baker, District Judge, and is argued by counsel and submitted.

OPINION.

Filed January 25, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 3214.

D. J. F. Strother, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

No. 3215.

Bankers Pocahontas Coal Company, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petitions to Review the Decisions of the United States Board of Tax Appeals.

(Argued October 20, 1931. Decided January 25, 1932.)

Before PARKER and SOPER, Circuit Judges, and BAKER, District Judge.

CAMDEN R. MCATEE and WELLS GOODYKOONTZ (MASON, SPALDING & MCATEE and GOODYKOONTZ & SLAVEN on brief) for Petitioners, and ANDREW D. SHARPE, Special Assistant to the Attorney General (G. A. YOUNGQUIST, Assistant Attorney General, SEWALL KEY, Special Assistant to the Attorney General, C. M. CHAREST, General Counsel, Bureau of Internal Revenue, and DEWITT M. EVANS, Special Attorney, Bureau of Internal Revenue, on brief) for Respondent.

SOPER, Circuit Judge:

Bankers Pocahontas Coal Company vs. *Commissioner*, No. 3215:

The subject matter of this suit involves income and profit taxes of the Bankers Pocahontas Coal Company for the calendar years 1920-1926, as determined by the Board of Tax Appeals. Deficiencies in substantial amounts were charged against the taxpayer in each of these years; and a petition to review was filed. The Board made the following findings of fact with reference to the property concerned:

"In July, 1912, the Bankers Pocahontas Coal Company, a West Virginia corporation, acquired the fee simple title to approximately 6,200 acres of coal lands, including both the surface and the mineral rights in the State of West Virginia. The land had no appreciable value except for the coal content.

Upon incorporation in 1912, the corporation acquired by formal assignment and has continued to retain the beneficial interest of the original owners in certain contracts affecting the coal content which were executed in 1901 and 1902 with various operating companies and to which contracts the 6,200 acres and coal content were subject.

These contracts were originally prepared by D. J. F. Strother, who at that time was attorney, director and stockholder in the predecessor corporations. The form

of the contracts is that prevailing in the West Virginia coal fields, which followed the Pennsylvania form of contract as introduced by Pennsylvanians who were largely instrumental in the early coal development in the West Virginia field."

Each of these contracts purported to be a contract of lease between the prior owner of the land, as lessor, and a coal mining company, as lessee, covering a tract of land in McDowell County, West Virginia, for a period of thirty years from January 1, 1901. It was provided that the lessee should have the sole and exclusive privilege of mining and coking coal on the premises, and of conducting a general mercantile business thereon. In consideration thereof, the lessee agreed to pay to the lessor, as rental for the premises, a royalty (ranging from 1c to 10c) for each ton of coal mined and sold or used for any other purpose than the manufacture of coke, and a larger amount for each ton of coke manufactured and sold upon the premises. In some cases, a minimum annual rental or royalty (ranging from $4,000 to $10,000) was agreed upon. In addition, the lessee agreed to pay all taxes assessed against the property, or the coal mined, coked or manufactured. The lessee was given the option to renew the lease at its expiration; and provision was made for the final valuation and disposition of the improvements placed upon the land by the lessee.

The contention of the taxpayer is that these contracts, executed in the years 1901 and 1902, and acquired by it in the year 1912, were sales of coal in place that were fully complete before the Sixteenth Amendment went into effect; and that the royalties received during the period 1920 to 1926 were merely payments of obligations that existed unconditionally on March 1, 1913, and were not income taxable under the federal revenue acts. It is said that this construction of mining leases as sales of coal in place is the law of the State of West Virginia, laid down by its highest court, and is therefore a rule of property which the Federal courts must respect and enforce. The Board of Tax Appeals, however, overruled this contention, and directed that the royalties should be included in the gross income of the taxpayer, subject to taxation.

The application of the income tax statutes passed in conformity with the Sixteenth Amendment to the proceeds of mining was first considered by the Supreme Court in *Stanton* vs. *Baltic Mining Co.*, 240 U. S. 103. The court held that a tax on the product of a mine is not, in its essence, a direct tax on property merely because some exhaustion of the ore body must result from the working of the mine; and that even though an adequate allowance is not made for the depletion of the mineral, the tax does not become a direct tax on property because of its ownership. On the contrary, it was held in accordance with its former ruling in *Stratton's Independence* vs. *Howbert*, 231 U. S. 399, that such a tax is a true excise levied on the business of carrying on mining operations. The Supreme Court reiterated and applied this rule in *Von Baumbach* vs. *Sargent Land Co.*, 242 U. S. 503, where it was held that royalties from mining leases on lands in Minnesota constituted income subject to the Corporation Tax Law of 1909. It was pointed out that under the law of Minnesota, such leases are not merely conveyances of the ore in place, and do not constitute a sale of any part of the land, but the ore derived from the operation of the mines constitutes rents and profits from the land. Commenting on this rule, the court said:

"Ordinarily, and as between private parties, there is no question of the duty of the federal court to follow these decisions of the Minnesota Supreme Court, as a rule of real property long established by State decisions. *Kuhn* vs. *Fairmont Coal Co.*, 215 U. S. 349, 360. Whether in considering this federal statute we should be constrained to follow the established law of the State, as contended by the Government, we do not need to determine. The decisive question in this case is whether the payments made as so-called royalties amount to income so as to bring such payments within the scope of the Corporation Tax Act of 1909. The prior decisions of this court in *Stratton's Independence* vs. *Howbert*, 231 U. S. 399, and *Stanton* vs. *Baltic Mining Co.*, 240 U. S. 103, in which the Stratton case was followed and approved, are decisive of this question."

The court also held that there was no difference as

to taxability of the gains from the mining operations, whether the ore was extracted by the mine owner, as in the Stratton case, or by a lessee of the owner, as in the case of the Sargent Land Company.

All of this ground was considered by the Circuit Court of Appeals of the Third Circuit in *Rosenberger* vs. *McCaughn*, 25 F. (2d) 699, a case which related to income taxes based on royalties or rents from coal lands in Pennsylvania. In that State, the courts apply a different rule from that in vogue in Minnesota, and hold that mining leases constitute sales of the mineral in place; and it was therefore argued that the case must be distinguished from the decisions of the Supreme Court we have cited. But it was held, and we think properly, that the rules of decision laid down by the state courts with regard to property, while generally controlling upon the federal courts, do not necessarily govern those courts in the interpretation of the laws of Congress in regard to taxation and, it was pointed out that in *Von Baumbach* vs. *Sargent Land Company, supra*, the Supreme Court had reached the conclusion that royalties from mines constituted taxable income wholly aside from the construction placed by the Minnesota courts upon mining leases. The Supreme Court declined to review this interpretation of its decision when it denied *certiorari*, 278 U. S. 604. See also *Hirschi* vs. *United States*, 67 Ct. Claims 637, *certiorari* denied 280 U. S. 576; *Berg* vs. *Commissioner*, 33 F. (2d) 641, *certiorari* denied 280 U. S. 598; *Burkett* vs. *Commissioner*, 31 F. (2d) 667, *certiorari* denied 280 U. S. 565; *Alexander* vs. *King*, 46 F. (2d) 235.

We shall assume, for the purposes of this decision, that the law of West Virginia, like that of Pennsylvania, is that a mining lease constitutes a sale of the mineral in place. It was said in *Coal Company* vs. *Overholt*, 81 W. Va. 427, 434, that the English and many American decisions hold that when, in a mining lease, the parties contract with reference to a mineral known to exist, the quantity of which is unknown and incapable of exact ascertainment, and the lessee covenants to bring forth a minimum quantity annually, and to pay a minimum royalty, the contract amounts to a sale of the mineral in the land and the lessee is bound to pay the minimum price. See also *Feather* vs. *Baird*, 85 W. Va. 267; *Urp-*

man vs. *Lowther Oil Co.*, 53 W. Va. 501; *Toothman* vs. *Courtney*, 62 W. Va. 167; *Smith* vs. *Root*, 66 W. Va. 633.

Nevertheless, we think that the royalties in question, subject to the deduction allowed by the Acts of Congress, constitute taxable income. There can be no doubt that it was the intention of Congress to tax them. It is provided in Section 234a of each of the pertinent statutes, to-wit, the Revenue Act of 1918, 40 Stat. 1057, the Revenue Act of 1921, 42 Stat. 227, the Revenue Act of 1924, 43 Stat. 253, and the Revenue Act of 1926, 44 Stat. 9, that in computing the net income of a corporation subject to the income tax, in the case of mines and other natural deposits, there shall be allowed as a deduction, a reasonable allowance for depletion, according to the peculiar conditions in each case. It does not follow, as the taxpayer assumes, that the royalties cease to be income under the Acts of Congress because the leases are sales and the royalties are part payment of the purchase price under the law of West Virginia. It is obvious, as the Supreme Court has pointed out, that something more is involved under a mining lease than a sale and delivery of valuable property. Before the business is complete, there must take place the whole process of locating, extracting and preparing the ore for market. This is a manufacturing process, and in this aspect the royalties are seen to be income of the business and as such, subject to taxation. The federal courts must respect the local laws of property laid down by the courts of the state, but the power of Congress to tax must be judged by the realties of the situation and not by the logic of state rules of property, pushed inexorably to their extreme.

In *Weiss* vs. *Wiener*, 279 U. S. 333, the taxpayer, who was in the business of taking long leases on real property and subletting, claimed the right to make an annual deduction from his income for estimated depreciation of the buildings, but the Supreme Court decided that the claim was unfounded since he was not the owner of the property. The court said (p. 337):

"It does not matter that in Ohio, where the properties lie, these long leases are treated as in many respects like conveyances of the fee. The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption

and that do not allow the deductions demanded whatever the lessees may be called. We understand this to be the view taken by the Department for a long time, and we are of opinion that it should not be disturbed."

It may be noted, in passing, that the Supreme Court of Appeals of West Virginia itself did not apply the rule with regard to mining leases literally when it came to the subject of taxation; for in *Harvey Coal & Coke Co.* vs. *Dillon*, 59 W. Va. 605, it held that a mining lease, similar in all substantial respects to those involved in the pending case, constituted a chattel real, taxable to the lessee under a West Virginia statute which provided for the taxation of personal property, including, in that term, chattels real. This decision was made notwithstanding the contention that the deed created not a chattel real but a sale of the coal itself *in situ*, taxable only as realty.

The taxpayer does not seem to deny the force and effect of the decisions of the Supreme Court we have cited, but claims that the Court has since discarded the theory laid down in these cases and has returned to the well established rule that the state law of property must be accepted and applied by the federal courts. Reference is made to *Tyler, Adm.* vs. *United States*, 281 U. S. 497, *Crooks, Col.* vs. *Harrelson*, 282 U. S. 55, and *Poe, Collector* vs. *Seaborne*, 282 U. S. 101; but it is obvious that each of these decisions turned upon the fundamental question whether the property sought to be taxed came within the purview of the taxing statutes. When it was clear that such was the case, the federal statute was given effect; as in *Tyler* vs. *U. S.*, 281 U. S. 497, where the court held that the value of a tenancy by the entireties should be included in the gross estate of a decedent, for the purpose of computing the tax upon the transfer of the net estate, although, under the state law applicable to such an interest, it could not be said in a strict sense of the term that a transfer of the property had taken place. In the other cited cases, on the other hand, property was held to be excluded from the tax proposed because it did not come within the terms of the statute, and this conclusion was maintained although it was occasioned by observance of a state rule of property, and it was clear that the ruling would bring about a lack of uniformity in the incidence and operation of the tax in

different states by reason of diversity of local property rules. The Supreme Court has never abandoned the rule as to the effect of state decisions on questions of property; but it has held in some instances that state decisions do not cover the whole ground to which the federal taxing statutes relate, and in other instances, that the statutes or decisions of the state lay down rules which define and limit the property which Congress has undertaken to tax.

It is next objected that even if the royalties of the mine are taxable, an insufficient allowance for depletion has been made. The Commissioner estimated the allowance at 3.6c per ton, as the value of the coal in place on the basic date of March 1, 1913; and the deficiencies were determined on this basis. The taxpayer contends that an allowance of 5c per ton should have been made because this sum has been fixed as *res adjudicata* between the parties by reason of a judgment of the District Court of the United States for the Southern District of West Virginia rendered on January 21, 1928. The Commissioner had previously determined a deficiency against the taxpayer for the years 1914 to 1919, using the unit value of 3c per ton, and had imposed additional taxes in the sum of $6,267.08, which the corporation had paid under protest. Thereafter it brought an action against the Collector of Internal Revenue at Parkersburg, West Virginia, wherein the court determined that the rate should be 5c per ton, and rendered a judgment in favor of the taxpayer for $5,373.01, which the United States paid. Hence the taxpayer claims that the question is no longer open between it and the government, since it is a general principle that when a fact is distinctly put in issue, and directly determined by a court of competent jurisdiction between the parties in a law suit as a ground for recovery, it cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action. *Southern Pacific R. R.* vs. *U. S.*, 168 U. S. 1, 48; *New Orleans* vs. *Citizens Bank*, 167 U. S. 371.

The rule is applicable, however, only when the subsequent suit is between the same parties or their privies. The taxpayer maintains that we have that situation in the present litigation because the United States in reality is its opponent in both cases, being represented by the

Collector of Internal Revenue in the prior suit, and by the Commissioner of Internal Revenue now. But the argument is refuted by the decision in *Sage* vs. *United States*, 250 U. S. 33, where it was expressly ruled, against the protest of the government, that the court was not bound by a judgment in a former suit concerning the same subject matter between the taxpayer and a Collector of Internal Revenue, because a suit against a Collector of Internal Revenue is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. This ruling has recently been cited with approval by the Supreme Court in *Graham & Foster* vs. *Goodcell*, 282 U. S. 409, 430. The decision of the District Court for the Southern District of West Virginia was therefore not binding upon the Commissioner, and he had the authority to determine anew, as a question of fact, what allowance should be made for the depletion of the mine.

In reviewing the Commissioner's determination, the Board took into consideration not only the evidence introduced before the District Court in the prior case, but also additional evidence. The president of the corporation testified that the cost of the property, when acquired in 1912, did not exceed $507,000, a fact casting strong light on the value of the property on March 1st of the following year; in 1915, an engineer estimated that there were then twenty million tons of mineable coal, having a total value of one million dollars; on December 31, 1917, an entry was made upon the general ledger of the taxpayer that the estimated value as of March 1, 1913, on the basis of twenty million tons of coal at 5c a ton was one million dollars; and the income tax return filed for these years claimed a March 1, 1913, value of the property of one million dollars. A stipulation, filed by the parties before the findings of fact and opinion of the Board were made, to be received as a statement of fact upon any question necessary to any computation under Rule 50 of the Board, contained a schedule showing that the estimated recoverable tonnage on March 1, 1913, was 37,608,642 tons. The stipulation also included a resume of the leases, with the approximate acreage and royalties per ton in each, and also the tonnage mined and royalties received for the years 1913 to 1919 inclusive, as well as the tonnage mined, the tonnage paid for and

the royalties received for the years 1920 to 1926. From this resume of facts, it is obvious that there was substantial evidence to support the finding of the Board. As it pointed out, an allowance of 3.6c per ton would return to the taxpayer a total of $1,353,911.11 upon the tonnage estimated in the stipulation. It is true, as the taxpayer contends, that a different result might have been based upon the evidence in the record; but it is not the province of this court to find the facts anew. We merely ascertained whether there is substantial evidence to support the findings of the Board.

The taxpayer objects to the use by the Board, in determining the depletion rate, of the estimated tonnage in place on March 1, 1913, as shown by the stipulation. It is said that the stipulation was made merely to aid in the computation of the deficiency under Rule 50. The rule is applicable when the Board determines the issues in any proceeding, and withholds decisions of deficiencies for later computation. If the parties are in agreement as to the amount, copies of their computation are filed for entry of the decision; but if not in agreement, the parties may file their respective computations, and an opportunity to be heard is afforded. But any hearing is strictly confined to the consideration of the correct computation, and no argument may be made upon issues or matters disposed of by the report of the Board, or upon any new issues. The stipulation was filed in this case before the time had arrived for the filing of computations under the rule. The Board had not yet determined the principles to be applied in the computation of the deficiencies, and one of the important issues was the rate of depletion to be used in case the royalties should be held to be income. The stipulations of fact were obviously filed by the parties to enable the Board to reach correct conclusions upon the disputed points. We think the Board properly took the stipulated facts into consideration in determining the depletion allowance. They could not justly have been considered for one purpose, and not for others.

After the Board had filed its findings and opinion, the parties filed conflicting computations of deficiency, which then came on for hearing under Rule 50. The taxpayer then for the first time made the point that the schedules filed showed that under two leases, the coal

paid for in several years substantially exceeded the coal mined, and offered to introduce the leases to show that the payments were made as minimum royalties required under the contracts, with leave, to the lessees, at any subsequent time, to take out the coal paid for. The Commission objected to the offer as new matter not receivable at that stage of the proceedings, under the provisions of the rule. The Board decided that the offer constituted in effect a request for rehearing and reargument; and finally filed its order of decision without granting a rehearing or considering the evidence offered. This ruling the taxpayer assigns as error.

It is provided in Regulations 45, 62, 65 and 69, Article 216, that in case a lessee under a mining lease is required to pay annually a specified sum to be applied in payment of royalty for mineral, whenever the same shall be extracted and removed, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance, will constitute an allowable deduction from the gross income of the year in which the payment shall be made. It would have been proper to have introduced the leases in evidence at the original hearing of the case before the Board had determined the issues involved. But the taxpayer put in evidence only one of the contracts of lease as typical of all the rest. Under this form of lease, the right of the lessee to mine additional coal to offset the excess of royalty paid in any year was limited to the next succeeding year after the amount necessary to produce the minimum royalty for that year had been mined. To such a situation under the facts proved, Article 216 had no relevance. The Board was accordingly correct in its ruling that to receive in evidence the new matter offered by the taxpayer was equivalent to the granting of a rehearing of the case. It was within the sound discretion of the Board to grant or deny the taxpayer's motion; and since the evidence must have been in the possession of the taxpayer from the beginning, we cannot say that the discretion of the Board was abused. *Boggs and Buhl* vs. *Com.*, 34 F. (2d) 859, 861.

Another question for decision relates to the sum of $3,770.40 paid to the corporation in 1924 as damages for an unlawful trespass. The Board made the finding of fact that in 1920, the Flanigan Coal Company, which

owned land adjacent to that of the taxpayer, trespassed on the latter's land and removed coal to which it had no right. It then destroyed the entries and as a result the extent of its operations could not be determined. The situation was discovered in 1923, whereupon the taxpayer brought suit for damages and claimed compensation not only for the coal removed, but also for damages to the property. In 1924 the suit was compromised by the payment mentioned, but this settlement had no relation to the coal extracted as the amount of the same could not be determined. The Board quoted the testimony of the president of the corporation to the effect that the destruction of the entries had absolutely destroyed the method of going into the mine at that point; that he and his engineers had estimated that the damages to the property and to the seam of coal were at least ten thousand dollars; and that $3,770.40 was accepted because the trespasser at the time was in a precarious financial condition.

The Commissioner held that the damages received constituted gross income in the year 1924; that the trespasser had mined or damaged 15,000 tons of coal; and that the taxpayer was entitled to deduct from the amount received the sum of 3.6c per ton, or $540, for depletion. The Board sustained this action. It said that a loss caused by a tortious act, if not compensated for by insurance or otherwise, is deductible from gross income; but that the evidence did not afford facts from which the amount of the loss might be determined; and that the cost of the coal removed by the trespasser or its value on March 1, 1913, was not known. Hence it held that no deduction could be allowed for loss in 1920. As to the year 1924, it made the following statement:

"The same situation obtains with respect to the year 1924. The company received from the trespasser $3,770.40. The petitioner has found that all but $540 of this amount (which he has allowed as a deduction from gross income as depletion) constituted taxable income of the company for 1924. The company has submitted no evidence that the cost or March 1, 1913, value of the coal removed by the trespasser was in excess of $540 or that such basis plus damages to the property was in excess of $540. The determination of the Commissioner

is therefore sustained for lack of evidence showing error on the part of the respondent."

The taxpayer objects to this addition to its income for the year 1924, on the ground that the money paid by the trespasser was merely compensation for injury to the mine, and was in effect a return of capital. Any loss or gain in the transaction could be determined under the circumstances only upon a final disposition of the property. We think this position is sound. If the taxpayer were asking for a deduction from income in 1920 for the loss caused by the trespass in that year, it would be within the province of the Board to determine whether the evidence submitted by the taxpayer was sufficiently definite to justify the allowance claimed. The finding of the Board, that the amount of the coal removed could not be ascertained, showed that the amount of the loss was uncertain. But this finding likewise shows that the Commissioner's action in adding the sum of $3,770.40 to the gross income of the taxpayer in 1924, was without foundation. If there had been substantial evidence to support the finding that 15,000 tons of coal had been unlawfully extracted, and that $3,770.40 had been paid solely in settlement of that wrong, it would have been proper to have added this amount to the gross income, less the expenses for collection and an allowance for depletion. The balance remaining would have been as clearly profit in the taxpayer's hands as if it had been paid by a lessee operating on a royalty basis. But the situation is confused by the fact that the amount of coal extracted is not known. So far as can be told from the record, the amount paid by the trespasser may not have exceeded payment at the rate of 3.5c per ton. In addition, there is the uncontradicted evidence of substantial damage to the approach to the mine.

These circumstances show that the Commissioner was not warranted in adding the sum of $3,770.40, less an estimated depletion allowance of $540 to the corporation's taxable income for the year 1924. We are not dealing with a situation like that considered by the Supreme Court in *Burnet* vs. *Sanford & Brooks Co.*, 282 U. S. 389, but with a loss of capital investment. In *Doyle* vs. *Mitchell*, 2447 U. S. 179, 185, the court, speaking of such a question, said: "In order to determine whether

there has been a gain or loss, and the amount of gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." A taxpayer is not allowed to deduct a loss from gross income until the amount is definitely fixed and ascertained; and for the same reason, he should not be charged with gain on pure conjecture unsupported by any foundation of ascertainable fact. See *Burnet* vs. *Logan*, 283 U. S. 404.

It follows that as to the determination of the deficiencies of the corporation for all of the years in question except the year 1924, the action of the Board is affirmed, and as to that year, the case is remanded for further proceedings in accordance with this opinion.

Strother, Petitioner, vs. *Commissioner of Internal Revenue,* No. 3214.

This case relates to the income of a stockholder of the Bankers Pocahontas Coal Company derived from dividends by which the greater part of the royalties which the corporation received, were distributed. During the several years involved in the foregoing case, 1920 to 1926, Strother, as one of the corporation's stockholders, received dividend payments from the company and reported them in his income tax returns, but did not return them as taxable income. The Board found, in its original findings of fact, that the corporation made distribution of the entire amounts received by it as royalties, including any depletion reserve. The Commissioner determined as deficiencies against Strother the total amounts received by him from the company, and made no allowance for that part of the moneys which constituted depletion of the capital. Upon these facts, the Board held in its opinion that to the extent that the distribution made by the corporation constituted a distribution of depletion reserve, the amount received by Strother was non-taxable.

The opinion established, as we have seen, that the royalties constituted income to the corporation, and not the proceeds of sale of mineral in place, and that the proper allowance for a depletion reserve was at the rate

of 3.6c per ton. By stipulation of the parties, the decision on these matters was adopted in the Strother case. After the decision was rendered, a hearing was held upon the recomputation of the Strother deficiencies. Strother objected to the new computation proposed by the Commissioner because it did not provide for the deduction from the dividends received of a proportionate part of the entire allowance for depletion. It seems that the total depletion allowance of the corporation for the years in question was $125,000, but the computation was made as if the total allowance was only $90,000. Apparently, the Commissioner held that a sum retained by the corporation in each year to meet the tax deficiency, was in fact part of the allowance for depletion, and to that extent, the allowance for depletion had not been included in the dividends. Another question seemingly involved was whether or not in determining how much of the dividends were capital, the total net income and the total depletion for the year should be pro rated to the date of each dividend payment.

These questions appear to be those which are raised by the petitioner; but the record in the case is so vague that we cannot obtain a clear conception either of the facts to be considered or the questions of law to be decided. This situation doubtless arose because the important questions in which the parties were interested were those concerning the character of the royalty payments as return of capital or income, and if income, the proper allowance to be made on account of depletion. A decision could not be reached in the Strother case until these questions had been determined. At the hearing on the question of recomputation of the Strother deficiencies, it was pointed out by counsel for the Commissioner that the record did not supply a complete basis for recomputing the Strother tax; that, strictly speaking, the taxpayer had failed to maintain the complete burden of proof, but that this was not reasonably to be expected under the circumstances. It was conceded that the recomputation proposed by counsel for Strother was literally in compliance with the decision of the Board, but that this decision was in need of revision. Thereupon, the Board announced that it would make an amendment of its findings of fact, and this was filed after the hearing. Instead of the statement that the corporation distributed

the entire amount received from its operating contracts, the finding was substituted that the corporation used such portion of the royalties as was necessary for the payment of administration expenses, set aside a certain reserve to meet the federal taxes, and distributed the rest to the stockholders. No change was made in the opinion as to the holding that to the extent the amounts received by Strother included depletion reserve, they were not taxable; and without further recomputation, the decision complained of was promptly entered.

The government's brief in the case before us suggests that the record does not contain sufficient facts to permit a determination of the questions raised, and that therefore the Board's decision should not be disturbed. We think, however, that under the circumstances, it would be just for the Board to give further consideration to the Strother case, and to afford to the taxpayer an opportunity to introduce additional testimony to bring out the facts necessary to a decision of the issues involved. The case will therefore be remanded for further proceedings in accordance with the opinion in the case of *Bankers Pocahontas Coal Company* vs. *Commissioner*, insofar as it determines the questions involved herein, and without prejudice to the right of petitioner to rely upon the legal positions as to other matters urged upon this appeal.

Case No. 3214, *Remanded for further proceedings.*
Case No. 3215, *Modified.*

JUDGMENT.

Filed and Entered January 27, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 3215.

Bankers Pocahontas Coal Company, Petitioner.

vs.

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, affirmed except as to the determination of the deficiencies of the corporation for the year 1924, and as to this year, this cause be, and the same is hereby, remanded to the United States Board of Tax Appeals for further

proceedings in accordance with the opinion of the Court filed herein.

January 27, 1932.

MORRIS A. SOPER,
U. S. Circuit Judge.

February 8, 1932, petition of petitioner for a stay of the mandate is filed.

Same day, order staying mandate is filed.

PETITION OF PETITIONER FOR A REHEARING.

Presented February 26, 1932.

United States Circuit Court of Appeals for the Fourth Circuit

No. 3214

D. J. F. STROTHER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

No. 3215

BANKERS POCAHONTAS COAL COMPANY, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR REARGUMENT AND REHEARING BY EACH PETITIONER.

Come the petitioners herein by their attorneys, and move the Court for a reargument of the cases pre-

sented, and a rehearing of the Court's decision of January 25, 1932, particularly for the reasons and causes herein specifically stated, as well as others apparent on the records, and to be amplified by reargument and rehearing.

The respondent taxgatherer proposes to assess and levy the taxes in controversy solely as taxes upon income authorized by the XVI Amendment, and imposed under the several Revenue Acts which give effect to said Amendment.

The petitioning taxpayers herein protest against said assessment and levy on the ground that said income taxes are neither authorized by the XVI Amendment, nor imposed by the various Revenue Acts.

A citizen may owe a tax as of right, but under the law he may not owe same. In case of doubt whether a tax is owing, the citizen may claim the benefit of the doubt.

In support of the present motion, petitioners respectfully would show the Court has erred as follows (error indicated by black face type):

(1) This Court holds:

> The certain instruments executed in 1901 by a land-owner (whose resulting interest was acquired by petitioner corporation in 1912), granting the exclusive right to mine the coal-content from said land until exhausted in consideration of payment by the grantee of a fixed amount per ton mined each year, and of a fixed minimum annual payment, effected sales of coal in place under the Laws of West Virginia where the lands are situate; **that the payments receivable by the grantor (or its assignee) pursuant to said instruments in the several years, are royalties,**

which Congress intended to subject to income tax under the several Revenue Acts enacted pursuant to the XVI Amendment after deduction therefrom of the depletion allowances provided by said Acts as available to a lessor.

The definite errors are:

(a) By said sale in place, as effected before the enactment of the XVI Amendment on March 1, 1913, was created the right to recover or collect the purchase money in the ensuing years before and after said date, and said payments, whether called royalties or not, when received after said basic date are not taxable income in whole or in part.

(b) The Congress has only allowed depletion to the owner of an interest in the depletable property, including lessor and lessee, and has not allowed nor intended to allow depletion to a vendor who has parted with interest in the property.

(c) The Revenue Acts make other provisions for determination of the taxable profit of a vendor.

(d) This Court has wrongly applied the law to the facts of the case.

(2) This Court holds:

That the depletion rate of 3.6 cents per ton is applicable to coal mined, and not to coal paid for but not mined, whereby the payments, as to the excess of any payment over the part thereof determined by the quantity of coal mined, is not subject to any depletion allowance.

The error is:

(a) The depletion unit, being premised upon the expectancy of entire annual minimum pay-

ments, should apply to coal paid for instead of coal mined in the several years.

(b) The Courts have reversed the position of the Board as herein substantially adopted by this Court.

ARGUMENT.

These points of decision are argued here because if the error alleged in the first be admitted, the second is immaterial. In presenting the cases, the parties were in conflict as to the construction of the instruments under the West Virginia precedents, petitioner contending they effected sales in place, and respondent contending they were only leases. The parties were not in conflict that the West Virginia rule, whatever the Court found it to be, was decisive of the liability of the payments to tax. In view of the uncertainty whether a sale in place was effected, petitioners before the Board and before this Court, were obliged to argue the sufficiency of the depletion allowance as the alternative arising for decision if there was no sale in place. When a sale in place is established the amount of depletion becomes immaterial, as that issue is removed from the case. The vendor who has parted with the depreciable property can have no depletion allowance against its sales proceeds, under the Revenue Acts.

Now, that this Court specifically holds the instruments effected sales of coal in place, the path is straightened toward final and correct determination of the rights of the parties under the XVI Amendment and several Revenue Acts. In addition to the grounds given in the opinion for holding a sale in

place was effected, specific reference to the instruments strengthens said conclusion. It appears, that the vendor owner covenants the purchaser of the coal content *"shall have quiet and peaceful enjoyment of same"* (the certain tract of land), thus giving the purchaser *control* and *possession* of the whole tract; the vendor owner further gives the purchaser *"the privilege* of using so much of the surface of said land, and so much of the lumber, stone, sand, clay and water *as may be necessary"*, thus evidencing the intent of making a severance of realty, and giving entire possession for benefit of the purchaser from any, dominion, control or possession by the vendor owner. The interpretation of these unique and unusual provisions is controlled by the manifest intentions of the parties, and is but little influenced by other contracts of a like general nature, but lacking such direct contractual provisions, and leads inevitably to the conclusion that a sale in place was intended and effected.

This brings us to the discussion of the specific errors above alleged:

1(a) By said sale in place, as effected before the enactment of the XVI Amendment on March 1, 1913, was created the right to recover or collect the purchase money in the ensuing years before and after said date, and said payments whether called royalties or not, when received after said basic date were no more taxable income than were the payments of same received before said date.

The XVI Amendment, says Mr. Chief Justice White in *Stanton v. Baltic Mining Co.*, 240 U. S. 103:

"conferred no new power of taxation"—

In his earlier opinion in *Brushaber v. Union P. R. Co.*, 240 U. S. 1, Judge White pointed out that Congress was invested by the Constitution with every conceivable power of taxation, subject to provisions thereof that direct taxes should be apportioned and indirect taxes should be uniform, and that the income taxes of the Civil War were classed as indirect taxes.

The opinion explains the XVI Amendment became necessary to remove the principle enunciated in the *Pollock* case (157 U. S. 429), that a tax upon income enacted as an excise tax subject to the rule of uniformity was a charge upon invested property, and, to that extent, was a direct tax requiring apportionment, and consequently unconstitutional.

In *Evans v. Gore*, 253 U. S. 245, the genesis of the XVI Amendment is reviewed, together with intervening precedents, as a basis for conclusion that same did not extend the taxing power to new or excepted subjects. Reference is made in the opinion to the message of Governor Hughes to the New York Legislature, expressing the fear that same might extend to excepted subjects, and to the assurances to the contrary thereby obtained.

As the XVI Amendment does not add to the power of Congress to tax, and merely struck down the *Pollock* principle, as said in the *Baltic Mining* case in that it

> —"simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being

> taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived''—

it follows the XVI Amendment authorizes no income tax upon a claim accrued before and existing on March 1, 1913, when subsequently recovered or collected. The proposition states itself and is a mirror for our argument. Such a claim was capital, and the realization of its subsequent proceeds remains as capital. Thus in *Burnet v. Logan,* 283 U. S. 404, taxpayer after March 1, 1913, sold certain stock for a consideration payable in cash and in the receipt of certain royalties upon ore subsequently mined. It is held she received no taxable income in the payment to her of the royalties, until and after such payments had returned to her the value of her stock when same was sold, and that any attempt to state a partial capital return by depletion calculations would be and is a determination of income by mere conjecture not available to respondent, and not to be imposed on taxpayer.

In the present case for example, the receipts including the years in controversy since March 1, 1913, total $750,000 which is less than the $1,000,000 value in 1913 which the Board and Court says will be returned to the extent of $1,300,000 upon exhaustion of the mines. It follows said capital value of 1913 has not been received, and that no income is contained in the annual payments. If there be no income, the entire receipt is a return of capital.

Test it as you will, the annual receipt of payments of the purchase price for the sale of coal in place is the return merely of capital without income increment.

1(b) The Congress has only allowed depletion to the owner of an interest in the depletable property, including lessor and lessee, and has not allowed nor intended to allow depletion to a vendor who has parted with interest in the property.

If this proposition is correct, it is not necessary to argue for the weight that Congress may or may not give to state rules of property in levying the income tax. That Congress must and does recognize the state rules of property becomes self-evident.

In *Stanton v. Baltic Mining Co.*, 240 U. S. 103, and *Burnet, Commissioner, v. Thompson Oil and Gas Co.*, 283 U. S. 301, the rule is definitely stated that a taxpayer is not entitled as a matter of right to make any deduction from annual income for depletion, and authority therefor must be found in the Revenue Acts. The several Revenue Acts allow the prescribed deduction to an owner, and to lessor and lessee, by equitable apportionment of same between them. The deduction is not allowed otherwise, and the right to it is strictly construed. Thus the *Thompson Oil* decision denies any increase in the depletion deductions for later years to redress the apparent inadequacy of deductions previously permitted. In *Darby Lynde Co. v. Commissioner*, 51 F. (2) 32 (C. C. A. 10) (cert. denied, 52 S. C. 40), the depletion on discovery value available to a partnership is denied to a successor corporation created and owned by the partners. In *Pugh v. Commissioner*, 49 F. (2) 76 (C. C. A. 5) (cert. denied, 52 S. C. 22), the taxpayer is held upon conveyance by him of his interest in a mineral lease to thereby lose

the right to depletion as to said interest, the ground being he has become a lessee without investment. In *South Vernon Oil Co. v. Hopkins,* 49 F. (2) 1028 (C. C. A. 5), the conclusion is the same, notwithstanding the Revenue Act of 1926 defines allowable depletion as a fixed per cent of gross income from the property during the taxable year, on the ground the sale severed the depletable interest in the property. In *Fleming v. Commissioner,* 6 B. T. A. 900, affirmed 50 F. (2) 1075 (C. C. A. 9), the life beneficiaries under trusts are held not entitled to depletion against trust income consisting of royalties from ore properties. In *Murphy Oil Co. v. Burnet, Commissioner,* — F. (2) — (January 11, 1932) (C. C. A. 9), the Court describes the statute:

> "The Statute with reference to depletion of oil properties is a special one with reference to the particular subject of oil leases involving the production of oil and minerals from mines, and the consequent return of capital by the owners of interests therein, and controls over other general provisions of the law in regard to the return of capital investments."

In *Weiss v. Wiener,* 279 U. S. 333, as this Court says: The depreciation upon buildings contended for by taxpayer was disallowed notwithstanding his long lease savored of a fee under the laws of Ohio, because:

> "The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption and that do not allow the deductions demanded whatever the leases may be called"—

which is a reiteration of the fact of the case, stated in the opinion as follows:

> —"he must show an interest in the property and a present loss to make the statute apply."

Mr. Justice Holmes correctly finds Wiener as lessor was merely renting the property and improvements, and being without interest therein, had no right to the depreciation allowance prescribed in the Revenue Act. In so doing, reference is made to *Lynch v. Allworth Stevens Co.*, 267 U. S. 364, where a lessee is declared entitled to depletion, although without title to the ore deposit, since the right to remove the ore is a property right which decreases as the mine is exhausted. There is no decision that the so-called lessor remains a lessor after parting with title to the mineral. We do not believe this Court intended to lay down that unique proposition of law in its opinion, but such is its effect.

Admitting the "Act of Congress has its own *criteria*, irrespective of local laws", it appears *interest in the depreciable or depletable property* is part thereof, and that in case of severance of the interest, or failure to acquire the interest, the taxpayer has no right to depreciation or depletion. But the Act of Congress does not prescribe the *criteria* of severance, and same must be found in the local law. If the discoverer of mineral conveys same he loses his right to depletion, and his purchaser does not acquire the right to deplete upon a discovery value. If the lessor sells his royalty interest, or the lessee sells his contract interest, each loses the right to depletion. If an owner sells coal in place, the right to depletion passes

to the purchaser and cannot be forced upon the vendor by the decision of this Court when not authorized by the Revenue Acts.

That the *criteria* of severance is derived from the local law appears in *Group One Oil Corporation*, 283 U. S. 279, where the local law of sale of mineral in place was held to divest the property of its previous immunity from tax. We point out other instances hereafter.

We have said it was not necessary to argue the weight to be given to local laws of property by Congress to sustain the present proposition. We are here dealing with real property and the position of Congress and of the Courts is that such rules must be recognized and given effect.

In *McCormick v. Sullivant*, 10 Wheat. 192, we read:

> "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass from one person to another."

In *United States v. Fox*, 4 Otto 315, we read:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within

> whose jurisdiction the property is situated. *McCormick v. Sullivant,* 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

As the sale in place made the owner and corporate petitioner (its successor), a vendor, Congress, through income tax taxation or otherwise, could not treat such vendor as a lessor. The proceeds of the sale in place became purchase money not rentals under a lease, and they so remain. If A owned no property he is not taxable as an owner, vendor or lessor, or if he leased his property he is not taxable as a vendor, or if he sold it he is not taxable as a lessor. As said in *Nichols v. Coolidge,* 274 U. S. 531:

> "—under the mere guise of reaching something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

1(c) The Revenue Acts make other provisions for determination of the taxable profit of a vendor.

Only a few pertinent decisions are given in support of this proposition for the sake of brevity. In *Fergu-*

son v. Commissioner, 45 F. (2) 573, (C. C. A., 5), taxpayer in Texas negotiated oil leases as to 7/8ths of the mineral, retaining the remaining 1/8th interest, and received thereby a cash bonus and the royalties. Under the laws of Texas he made a sale in place of the 7/8ths interest, and his bonus-receipt was held subject to the Revenue Act provision imposing a special rate of tax upon the bonus as a capital gain from a sale, and his retained interest was held subject to depletion allowances as a property interest retained by him.

In *Alexander v. King,* 46 F. (2) 235, a taxpayer in Oklahoma claimed her royalty receipts described as "the equal 1/8th of all oil produced and saved" were subject to the capital gain provision. But in Oklahoma there can be no ownership of oil in place, and consequently no sale of same, and consequently the capital gain provision was inapplicable as there was no sale.

In *Berg v. Commissioner,* 33 F. (2) 641 (C. C. A. of D. of C.) and *Burkett v. Commissioner,* 31 F. (2) 667, responding to the contention that the capital gain provision should apply, it was held the instruments did not effect a sale and the provision could not be invoked.

Herein, where this Court finds a sale in place of the entire coal content, it follows, under the *Ferguson* case, that the profit, if any, is subject to be ascertained under the capital gain provision and not under the depletion provision of the Revenue Acts. But neither applies until the receipts have returned the capital value sold, and we have shown such return is not yet accomplished.

1(d) This Court has wrongly applied the law to the facts of the case.

This Court concludes, after discussion of various judicial precedents, that the several instruments effected sales of coal in place, and, nevertheless, the payments receivable as the proceeds of said sales, subject to depletion allowances, constitute taxable income, saying:

> "The Supreme Court has never abandoned the rule as to the effect of State decisions on questions of property; but it has held in some instances that State decisions do not cover the whole ground to which the Federal taxing statutes relate; and, in other instances that the statutes or decisions of the State lay down rules which define the property which Congress has undertaken to tax."

Respectfully, this conclusion is provoking in its indefinite statement. The Federal taxing statutes, as in the *Tyler* case, deal with a succession or transfer tax or death duty laid upon the happening of an event as distinguished from its tangible fruits; or they deal with a tax upon the tangible fruits, that is the taxable income, if any, realized from a transaction. In either case, the tax springs into existence upon the happening of an event. In case of income tax laws, as Mr. Justice Holmes says in *Weiss v. Wiener, supra:*

> "They do not charge for appreciation of property * * * unless realized in money by a sale."

Having a sale in the present case, as the only material factor, we do not believe this Court intends to say:

> "—it (the Supreme Court) has held in *cases of a sale* that state decisions do not cover the

> whole ground to which the *income tax* statutes relate; and in other *cases of a sale* that the statutes or decisions of the state lay down rules which define the property which Congress has undertaken to tax."

for if that is its meaning, we cannot apply the rule as any decision of the present case.

The coal-lands herein undoubtedly represented a capital asset, the sale of any part of which might be made, but the Revenue Acts nowhere define a sale. The Supreme Court has defined a sale as:

> "Ordinarily a transfer of property for a fixed price in money or its equivalent." *Five Per Cent Cases,* 110 U. S. 471.
>
> "Sale is a word of precise legal import both at law and equity. It means at all times, a contract between the parties, to give and to pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson v. Berry,* 8 How. 495, 544.

As the word "sale" has an universal meaning, and as real property interests were sold in this case, in the absence of its definition in the Revenue Acts, resort must be had to the laws of West Virginia to determine the interest or title conveyed by the instruments, and this Court finds a sale in place was thereby made in 1901. It follows the vendor was thereby divested of ownership and interest, and that no interest is available for depletion allowances.

This Court refers to mining as a business and to royalties as income from same, and therefore subject to taxation. This is derived from *Strattons Independ-*

ence v. Howbert, 231 U. S. 399, rejecting the contention that:

> "—a mining corporation is not engaged in business, properly speaking, but is merely occupied in converting its capital assets from one form into another"—

but in that case the distinction applicable to this case is clearly stated:

> "The sale outright of a mining property might fairly be described as a mere conversion of the capital from land into money."

Having sold the coal content for money, herein the original vendor and its successor thereafter had no mine, no interest in a mining business, nothing but a claim for the purchase price as the result of conversion of its capital from land into money.

In *Stanton v. Baltic Mining Co.*, 240 U. S. 103, it is true the *Stratton* case was followed, but that does not make either decisive herein. In both those cases, the taxpayer was "*carrying on mining operations* * * * *upon mining lands owned by itself*", and engaged in a manufacturing process. In the *Stanton* case, it was contended the income tax fell upon the property and was prohibited by the Pollock rule; it was decided the XVI Amendment destroyed the Pollock precedent, and that as an excise tax same was not a direct tax upon property.

In *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, quoted by the Court, the situation is summarized in the opinion as follows:

> "We think that the payments made by the lessees to the corporations now before the Court

> were *not in substance the proceeds of an outright* sale of a mining property, but, in *view of the terms of these instruments, were in fact rents or royalties* to be paid upon entering into the premises and discovering, developing and removing the mineral resources thereof, and, as such, must be held now as then, to come fairly within the term 'income' as intended to be reached and taxed under the terms of the Corporation Tax Act." (Our italics.)

To complete our argument we cite *United States v. Biwabik M. Co.*, 247 U. S. 116, in which a lessee in Minnesota of iron ores is held, upon authority of the *Sargent* case to be *"in no legal sense a purchaser of ore in place"*, and not entitled to any depletion. By the *Sargent* case (the lessor) and the *Biwabik* case (the lessee), it appears neither lessor nor lessee was entitled to any depreciation under the Act of 1909, and, in *Lynch v. Alworth Stevens Co.*, 267 U. S. 364, this is plainly stated. The Revenue Act of 1916, however, provided a deduction for "exhaustion of property arising out of its use", and the *Lynch* case held same was not available alone to the lessor as the holder of title, but was available also to a lessee who had no title to the ore in place. This conclusion is placed on the ground that the right of the lessee to mine and remove the ore is property within the meaning of the statute.

In these authorities there is no direct definition of the depletion rights applicable to *proceeds of an outright sale,* but a distinction between such *proceeds* and mere *royalties* or rentals is evident. The Court carefully defines the receipts as not *proceeds of a sale,* or characterizes the taxpayer as *not a purchaser,* or as *with or without an interest* in the ore in place.

Hirschi v. United States, 67 Ct. Cl.; *Berg v. Commissioner,* 33 F. (2) 641, and *Burkett v. Commissioner,* 31 F. (2) 667, have some authority when the denial of certiorari is suggested. But the *Burkett* and *Berg* instruments do not appear to be more than leases and the decisions become immaterial. The *Hirschi* instrument is held not effective as a sale in place under the laws of Texas and the Court supports same by citation of *Steedman v. United States,* wherein certiorari was denied, but the *Steedman* case is expressly disapproved in *Crooks v. Harrelson,* 282 U. S. 55. The *Hirschi* case is in effect disapproved in *Group One Oil Corporation v. Bass,* 283 U. S. 279. The Court of Claims says in the Hirschi decision:

> "Congress in passing a revenue act does not, and is not called upon to suit the revenue system of the country to the varying and conflicting decisions and laws of the different states.

But in the later decision of *Poe, Collector, v. Seaborn,* 282 U. S. 101, the Supreme Court said:

> "These Sections (of the several Revenue Acts) lay a tax upon the net income of every individual. The Act goes no further, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase." * * *
>
> "Said differences of state law, which bring a person within or without the category designated by Congress as taxable may not be read into the Revenue Act to spell out a lack of uniformity."

If the proceeds of a sale in place are not taxable when ascertained by the law of West Virginia, but, as proceeds of a lease, are taxable in another state, the return not subject to taxation in either case is the depletion allowance against same intended to return the capital outlay. There is no lack of uniformity for the vendee of the mineral in place takes the entire depletion deduction, while lessor and lessee divide same between them.

If the rule be that, notwithstanding a sale in place, the vendor is entitled to depletion, same conflicts with the established rule that depletion follows the property interest. It means the sole owner of the capital interest is partially deprived of the depletion deduction. It means a denial of final decisions to the contrary, and an allowance not authorized by law. It means confusion for the annual payments by the vendee are, as to him, capital investments not deductible from his gross income, *Jefferson Gas Coal Co. v. Commissioner*, 52 F. (2) 120 (C. C. A., 3), and as to the vendor they are rentals and not purchase-money receipts.

Rosenberger v. McCaughn, 25 F. (2) 699, is not rested upon the Supreme Court decisions in prior cases, but upon the ground that the calculation of income by the Commissioner as being within the payments received as proceeds of a sale in place is nowhere questioned and upon the ground—

> "—we think each payment represented in some measure both capital and increment, capital because it stood in the place of coal, and increment because in the payments running through ninety-nine years interest on the capital must inevitably have been included." • • •

This thought of the Court contravenes the settled rule stated with copious citation in *United States v. Merriam*, 263 U. S. 179:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms and expressions. But in statutes *levying taxes the literal meaning* of the words employed is most important, for such statutes are not to be *extended by implication* beyond the clear import of the language used. If the words are *doubtful*, the *doubt* must be *resolved against* the government and *in favor of the taxpayer* * * *."
>
> "I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes *within the letter of the law, he must be taxed*, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, *cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute*, when you can simply adhere to the words of the statute."

It contradicts *Saunders v. Commissioner*, 29 F. (2) 832 (C. C. A., 3); *Platt v. Bowers*, 13 F. (2) 951; *United States v. Guinzberg*, 278 F. 363 (C. C. A., 2); *Park v. Gilligan*, 293 F. 129, and *Schneider v. Duffy*, 43 F. (2) 642, previously discussed in the brief of peti-

tioners. It contradicts *Logan v. Commissioner,* 42 F. (2) 193 (C. C. A., 2), as recently affirmed in *Burnet v. Logan,* 283 U. S. 404. These are decisions that subsequent payments upon rights to money established and accrued before the XVI Amendment are only the return and collection of capital without income increment.

From these several viewpoints, we submit the Court has not applied the precedents properly because same, under the different facts of this case, and under subsequent *stare decisis,* are inapplicable to the present case.

2(a) The depletion unit, being premised upon the expectancy of entire annual minimum payments, should apply to coal paid for instead of coal mined in the several years.

(b) The Courts have reversed the position of the Board as herein substantially adopted by this Court.

These points relate to the alternative position that depletion is allowable herein.

The Board ruling and the approved tax determination allow depletion only upon coal mined in any year instead of upon coal actually paid for. In presenting its tax determination so approved, respondent's counsel (R. 108) stated apologetically to the Board:

> "—in the respondent's computation allowances were computed at the rate of 3.6 cents per ton upon tonnage mined each year; that this method was in accordance with the opinion in this case, and consistent with the Board's rulings in other cases, *although the respondent in other cases was committed to the principle*

of allowing depletion on tonnage of coal paid for instead of upon tonnage actually mined in a taxable year." (Italics ours.)

The struggle of the Board against the position of respondent and taxpayers that depletion is allowable upon coal paid for and not merely upon coal mined, which would include depletion on any bonus or payment in excess of the price of coal mined, did not reach the courts for a long time, and when it did the Board was recently reversed in *Murphy Oil Co. v. Burnet*, — F. (2) — (January 11, 1932) (C. C. A. 9). Therein, respondent, by cross-petition, carried the issue to the Court, and obtained a most thorough and convincing opinion upon the question.

In the present case, the Board set out in its findings certain schedules of production and royalty payments, which this Court has approved. Petitioner (R. 109) submitted same demonstrated the minimum payments substantially exceeded the payment for coal mined, and offered to confirm the fact by the instruments themselves. The refusal of the Board to allow depletion upon coal paid for is a specific assignment of error.

The materiality of the question arises in three ways:

First. If petitioner receives $200 as a 10-cent per ton payment on 2,000 lbs. of coal, of which only 1,000 lbs. was mined, its depletion allowed is 1,000 × .036, or $36.00, instead of 2,000 × .036, or $72. In other words, its depletion allowance being limited to coal mined, same is not allowed against the payment of $100 made for coal not mined, and same is thereby considered by the Board opinion as a bonus not subject to depletion.

Second. In computing the depletion unit of 3.6 cents, the bonus excluded from its application is given effect, but such effect is disallowed in only allocating the depletion unit against coal mined. This requires some explanation. The respondent's basis for the 3.6 cent allowance is stated in this record (R. 93) as an estimate of 14,000,000 tons of recoverable coal with average mining tonnage of 350,000 tons indicating a mine-life of 40 years with an average annual income therefrom of $34,000. After 40 years, in other words, the entire receivables of petitioner from the instruments amount to $1,360,000, the present worth of which on March 1, 1913, is $510,000. This latter amount divided by 14,000,000 tons gives the unit of 3.6 cents per ton. This method is described in Articles 206 and 211 in petitioner's brief (p. 60). This brings us back to the first proposition as applied to the second. It is that 3.6 cents is based upon the minimum royalties as a factor of computation, but if $34,000 is received annually and only $17,000 of coal is mined, the effect is to allow a depletion only on $17,000, whereby $17,000 is deemed a bonus and is denied depletion. Another statement of the situation is that petitioner receives in effect 1.8 cents instead of 3.6 cents per ton upon the $34,000 payment.

Third. The statute with reference to depletion, being a special provision intended to return their capital to the owners of interests in mining properties, the money received for coal paid for involves such return and should be subject to the depletion allowance.

Turning to the schedules in the Board findings we find substantial excess payments under Leases 2 and 4 as follows:

Year	Mined	Paid for	Excess	Mined	Paid for	Excess	Mined	Paid for	Excess
1920...	57,189	120,000	62,811	86,918	100,000	13,082	19,231	187,500	168,269
1921...	54,660	120,000	65,340	15,297	100,000	84,703	25,024	306,250	271,226
1922...	55,864	120,000	64,136	.....	.....	.....	45,483	370,433	324,950
1923...	51,422	120,000	68,578	.....	.....	.....	74,152	340,782	266,630
1924...	57,928	120,000	62,072	.....	.....	.....	103,877	343,657	239,780
1925...	68,804	120,000	51,196	91,170	100,000	8,830	117,792	325,000	207,208
1926...	90,029	120,000	29,971	.....	.....	.....	153,717	335,115	181,408
			404,104			106,615			1,659,471

In these seven years petitioner is deprived of depletion upon 2,000,000 tons—that is, petitioner pays tax upon $72,000, and further analysis serves to increase the amount, although petitioner and respondent agree the decision is wrong and the only Circuit Court of Appeals that has considered the question says the decision is wrong. As we have quoted from *Nichols v. Coolidge, supra:*

"Taxes are very real things."

When respondent and his counsel go into Court in another case to sustain his Departmental position and succeeds, it seems unusual that they should stand precisely for a contrary position herein. The foregoing schedules found relevant by this Court demonstrate the substantial difference between coal paid for and coal mined. It becomes immaterial whether the coal paid for could subsequently be mined because the receipts therefor, considered as a bonus, are subject to depletion, and the rulings of the Board to the contrary have fallen away.

This Court does not in its opinion refer to this point, although petitioners argued same in their brief (pp. 66-70). It is submitted it goes to the very heart of this case and is entitled to consideration. Evidently the *Murphy Oil* decision in the Ninth Circuit is final for respondent has therein sustained his previous position, and has thereby obtained a reduction of the tax for the taxpayer, and both parties are satisfied. It is unfortunate that petitioner and respondent herein were not standing together in this Court against the Board, as they stood at its bar and urged that depletion, if any, was allowable by the statute in this case

upon coal paid for. It would be more unfortunate if either party failed to bring the situation to the attention of this Court.

(3) The Court erred in holding the West Virginia judgment is not res adjudicata as to the allowable amount of depletion.

In the Board findings it appears the West Virginia Collector was defended by the United States District Attorney and the General Counsel of respondent. It is a matter of judicial notice that the Collector and Commissioner are each officials of the Government in related capacities as the duties of both are concerned with the collection of the revenue. It is equally clear the Collector was defendant in the West Virginia action, and the Commissioner is the defendant herein, and that neither proceeding is directly against the United States.

In its original brief, petitioner did not argue the United States was the real defendant and respondent laid down the proposition that these appeals were really proceedings against the United States, citing *Sage v. United States.* The situation therefore arises that, admitting a judgment against a Collector is not *res adjudicata* against the United States, whether such judgment is or is not *res adjudicata* against the Commissioner.

This Court does not decide the Commissioner is in effect the United States, and, as apparently the Commissioner and Collector stand in the same relative positions, we do not believe it will so decide. If this is not really a proceeding against the United States,

and it is no more so than the proceeding against the Collector, then this Court falls into error in holding *Sage v. United States* is authority for holding the Commissioner is not bound by the judgment against the Collector.

Even though petitioners had maintained that the United States was really the opponent herein and in the West Virginia action, it follows that the *Sage* decision would deny the contention. Thereby the United States was not bound in the West Virginia judgment and was not the real party in interest. Whether the United States is the real party here remains an undecided question not reached by the *Sage* decision.

This Court, before falling into said error, said:

> "The rule (*res adjudicata*) is applicable, however, only when the subsequent suit is between the same parties or their privies."

and we proceed from this point.

That the Collector and Commissioner were privy in the West Virginia case is found by the Board. The record (p. 89) further recites a consent order signed by the District Attorney and Special Attorney for the Bureau of Internal Revenue as well as the attorneys for plaintiff, and a stipulation of facts and agreement that all papers should be received with the probative weight of testimony from witnesses. Thus the privity in fact is evident if sustained in law.

Here is the case of the respondent Commissioner cooperating with the defendant Collector in defense of the West Virginia action, although not a party of record in same.

In *Beyer Co. v. Fleischmann Co.*, 15 F. (2) 465, (C. C. A., 6), where a similar situation prevailed, we read:

> "The general rule is that one who prosecutes or defends a suit in the name of another, to establish or protect some interest of his own, or who openly assists in an action in aid of some such interest, to the knowledge of the opposing party, is as much bound by the judgment as he would be if he had been a party of record. Penfield *v.* Potts & Co. (6 C. C. A.), 126 F. 475, 61 C. C. A. 351; Greenwich Ins. Co. *v.* Friedman Co. (6 C. C. A.), 142 F. 944, 74 C. C. A. 114; Foote *v.* Parson, etc. (6 C. C. A.), 196 F. 951, 118 C. C. A. 105; Southern Pacific R. Co. *v.* United States, 168 U. S. 1, 18 S. Ct. 18, 42 L. Ed. 355; Souffront *v.* La Compagnie Des Suereries, 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846."

In *White v. Croker,* 13 F. (2) 321 (C. C. A., 5), the rule is again stated:

> "The rule under which one not named in a judgment may be bound thereby in consequence of participation in the suit in which the judgment is rendered is that one who prosecutes or defends a suit in the name of another to protect or establish his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. Souffront *v.* Campagnie, etc., 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846."

In *Souffront v. Campagnie,* 217 U. S. 475, states the same rule:

> "The persons for whose benefit, to the knowledge of the court and of all the parties to the

> record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adverse party, as he would be if he had been a party to the record. Lovejoy *v.* Murray, 3 Wall. 1, 18 L. Ed. 129."

Further citation seems needless, as it is clear the Commissioner and Collector acted in concert in West Virginia and are equally bound by the result. Privity being admitted, it would reasonably follow the *res adjudicata* of the judgment as to the amount of depletion should be declared by the Court.

(4) The remanding of the Strother appeal is ineffective so far as compliance with the rulings in the Bankers appeal is required, unless said rulings be finally correct.

As the rights of Strother and other stockholders are dependent upon the decision in the case of their corporation, it follows such decision unless complete and correct in all material respects will only increase the error as affecting the stockholders.

If the corporation receipts as proceeds of sales in place effected before the XVI Amendment are not subject to tax, their distribution to stockholders is affected.

If, in the alternative, such receipts are subject to depletion allowances, such allowances must be correct to be properly effective.

If receipts measured by coal paid for but not mined are a bonus, whether same is or is not subject to depletion is material.

These relations between the case of the corporation and the stockholder emphasize the importance of finding the correct answer to the questions raised in these cases.

They demonstrate the propriety of the stockholder joining in this application for rehearing.

In Conclusion.

We respectfully submit as material error the failure of the Court to find:

1. That, as a sale in place is admitted to have taken place before passage of the XVI Amendment, the receipt of proceeds of the certain accrued claim, as paid thereafter, is a return of capital without income; capital is to be fully returned before income subject to tax can be ascertained.

2 (*a*) Alternatively, depletion is a special statutory allowance awarded to the owner of an interest in property. Where the interest is terminated by a sale in place, there can be no remaining interest sufficient to measure a depletion allowance in the proceeds of the sale.

2 (*b*) Alternatively, depletion allowances, if any, exist against all receipts from the depletable interest, including any bonus payment, and in these cases will

apply to coal paid for and not merely to coal mined in the several years.

3. Alternatively, depletion allowances, if any, herein as *res adjudicata* through the privity of the Collector and Commissioner in defending the West Virginia action.

We submit the Strother appeal must abide the reconsideration of the opinion in the Bankers case.

We submit any other error, of incidental nature, will disclose itself upon further consideration of the foregoing matters by the Court.

Respectfully submitted,

WELLS GOODYKOONTZ,
AMDEN R. McATEE,
Attorneys for Petitioners,
Bankers Pocahontas Coal Co.,
D. J. F. Strother.

Certificate of Counsel.

We, Camden R. McAtee and Wells Goodykoontz, attorneys of record for the petitioners in the above styled cases for review, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

(S.) CAMDEN R. McATEE,
(S.) WELLS GOODYKOONTZ,
Attorneys for Petitioners,
Bankers Pocahontas Coal Co.;
D. J. F. Strother.

ORDER DENYING REHEARING.

Filed and Entered March 7, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 3215.

Bankers Pocahontas Coal Company, Petitioner.

vs.

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

This Court having at its January term, 1932, rendered its decision affirming the decision of the said Board of Tax Appeals in this cause except as to the determination of the deficiencies of the corporation for the year 1924, and as to this year remanding said cause to the United States Board of Tax Appeals for further proceedings in accordance with the opinion of the Court filed herein, and the petitioner having on February 26, 1932, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered by this Court that the rehearing asked for, be, and the same is hereby, denied.

Let mandate issue after the expiration of five days from this date.

March 7, 1932.

JOHN J. PARKER,
Senior Circuit Judge.

March 11, 1932, petition of petitioner for a stay of the mandate is filed.

Same day, order staying the mandate is filed.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR REHEARING AND REARGUMENT.

Filed in Open Court April 12, 1932.

(Style of Court and Title Omitted.)

Come now petitioners in the above entitled proceeding, by their attorneys, and tender their supplemental petition for rehearing and reargument, and move the Court for leave to file same, and to fix a date for hearing the parties on same.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Petitioners.

SUPPLEMENTAL PETITION OF PETITIONER FOR REHEARING.

Filed by leave granted in Open Court April 12, 1932.

United States Circuit Court of Appeals for the Fourth Circuit

No. 3214

D. J. F. STROTHER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

No. 3215

BANKERS POCAHONTAS COAL COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

(Consolidated for Hearing.)
(Before Parker and Soper, Circuit Judges, and Baker, District Judge.)

ON PETITIONS TO REVIEW DECISIONS OF UNITED STATES BOARD OF TAX APPEALS.
Argued October 20, 1931.
Decided January 25, 1932.
Petition for Rehearing Overruled.

SUPPLEMENTAL PETITION FOR REHEARING AND FOR ORAL ARGUMENT IN SUPPORT OF PETITION FOR REHEARING BY BOTH PETITIONERS.

Under Court Rule No. 29.

FILED APRIL 12, 1932.

By leave of Court therefor asked and granted: Petitioners respectfully request—

(1) A reconsideration of the denial of the Petition for Rehearing heretofore filed on February 26, 1932.

(2) Opportunity by oral argument to present reasons for said rehearing.

For cause:

(*a*) Court Rule 29, providing a petition for rehearing "will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the Court so determined," was construed by counsel to intend that the Court, as constituted at the hearing would *en banc* consider such petition. Accordingly, it was the impression the Court would not so sit together until April, 1932, at Richmond, Virginia. Consequently, no request for oral hearing upon the petition, and no brief in elaboration of reasons therefor was believed to be required until the Court would sit in April, 1932.

(*b*) Only after decision of these cases on January 25, 1932, did the petitioners and attorneys receive the opinion for their consideration.

On February 8, 1932, stay of the mandate was ordered on condition that within 30 days petition for rehearing be filed or application be made for certiorari to the Supreme Court. Petitions for rehearing were duly filed by both parties, and were denied on March 7, 1932, with direction for issue of mandate after five days.

On March 11, 1932, this Court ordered a stay of mandate for 60 days pending application for certiorari.

(* * * "unless otherwise ordered by this or the Supreme Court, and provided said application is filed in said Supreme Court within 60 days from this date.")

Thus, between the date of decision on January 25th and denial of rehearing on March 7, 1932, within 42 days, the petition for rehearing and its denial occurred, at a time of year and under present business conditions when the Court and counsel and litigants were necessarily engaged in giving attention and time to other important affairs of public and private character.

(*c*) As the right to change the order for stay of the mandate (quoted above) is reserved, the propriety of a rehearing is still believed to rest in and with the Court and may properly be granted if good and sufficient ground is shown therefor.

(*d*) This Court was created and constituted as a relief tribunal to the Supreme Court and strives to relieve that other great Court of the heavy labor imposed upon it, unless and until it feels bound as to finality of disposition of causes before it, when subsequent holdings after presentation of cases may and do occasion as here further consideration of fact or law.

(*e*) This decision and opinion are based on rules of law herein not pertinent to the facts, particularly in holding rules of taxation as to income of mines and their products determine the case when only real estate and its sale, *and not mines and their products,* is the subject matter presented herein. Verbal explanation is essential to presentation of a due understanding of the facts and to show the methods of income determi-

nation approved herein as applicable to the facts of these cases find no justification in the Revenue Acts.

(*f*) That the points made against the decision and opinion in the petitioners' Petition for Rehearing and their briefs, especially their Reply Brief, upon oral presentation of their soundness, will demonstrate the propriety of a holding contrary to the pronounced decision.

(*g*) That the decision of these cases according to law upon the rights involved presents or creates no precedent in taxation, as their facts indicate their concern with a deplorable coal land condition pointing to future decreases of the purchase money payments derived from sales made before the effective date of the XVI Amendment.

(*h*) That the orders of the Court as to further disposition of the cases entail further delay to that now accrued in disposing of them. Congress may not impose excessive fines (Article VIII, Constitution), yet herein large levies against capital assets, which are not income or profits accrued after 1913, have been required and satisfied, and carry additional penalties while the power so to tax said assets is in litigation these past twelve years.

This attrition through tax and penalty and incidental expense, merely because taxpayers are legally and by due process contesting the rights asserted against them, demonstrates the power to tax is the power to destroy, and that industry will languish under the oppression of taxes levied in the name of progress.

(*i*) The denial of certiorari by the Supreme Court in any case, wherein the findings appear to modify or contradict previous decisions of the Supreme Court does not establish nor approve such modification or contradiction. In *Atlantic C. L. Co. v. Powe,* 283 U. S. 401, 75 L. Ed. 1142, answering this precise question the Court quoted from its opinion in *United States v. Carver,* 260 U. S. 482, 67 L. Ed. 361, wherein it decided:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer."

(*j*) The *briefs* filed by the litigant parties did not refer to, nor did the *opinion* of this Court cite certain Federal Court decisions *reported* since the date of the decision. Evidently neither the Court nor counsel had those decisions before them at or before the decision or the order denying rehearing; said decisions are:

Commissioner v. Brown, 54 F. (2) 563 (Federal Reporter Feb. 22, 1932).

Old Colony Railroad Co. v. Commissioner, U. S. Supreme Court Advance Ops. No. 7, 1931 Term, p. 317; 76 L. Ed. 317.

Crile v. Commissioner, 55 Fed. (2) 804 (Federal Reporter April 4, 1932).

Hernandez, Collector, v. Becker, 54 F. (2) 542. (Federal Reporter Feb. 22, 1932).

Harmel v. Commissioner, — Fed. (2) —, (Federal Reporter, — 1932).

Second National Bank v. Woodworth, 54 F. (2) 672 (Federal Reporter February 22, 1932).
Murphy Oil Co., v. Commissioner, 55 F. (2) 17 (Federal Reporter, March 21, 1932).

Brief reference is here made to these recent decisions:

Petitioners contend that before the incidence of the XVI Amendment they owned the right to receive the purchase money contracted to be paid by the purchasers of coal sold to said purchasers in 1902, upon the basis of the coal thereafter taken out of the stratum or coal seam, and the liability of petitioners to income tax upon such contract receipts is the controversial subject. The claim to said receipts, *if an unconditional obligation* existing on and before passage of the XVI Amendment, when subsequently collected, does not constitute taxable income, this being the general rule. In *Commissioner v. Brown,* 54 F. (2) 563 (C. C. A.-1), such a claim, *existing as a conditional obligation,* is held not to be income when subsequently collected, upon authority of *Burnet v. Logan,* 283 U. S. 404. These decisions read together, or separately, are an all sufficient solution of the present cases.

Petitioners contend that, having prior to the XVI Amendment and Revenue Acts made contracts and thereby sold realty and passed the title to same, the subsequent payments do not constitute taxable income, and *Old Colony Railroad Co., v. Commissioner,* U. S. Supreme Court Adv. Op. 7, 1931 Term, 317, supports this position. The second, third, fourth and fifth headnotes of that decision are:

Second. "Premiums received on corporate bonds issued *prior* to the effective date of the Sixteenth Amendment to the Federal Constitution, authorizing Federal taxation of incomes, *may not* be made the *basis* of subsequent income taxation, although the Interstate Commerce Commission has required them to be amortized over the period of the respective lives of the bonds and a yearly ratable proportion thereof to be reported as income."

Third. "The amount of interest on bonded indebtedness which may be deducted from gross income in determining taxable income is the amount *contracted to be paid,* notwithstanding the fact that as the bonds were issued at a premium, the effective rate is less."

Fourth. "The legislature must be presumed to use words in their known and ordinary significance; and this rule is applicable to taxing acts."

Fifth. "Terms used in tax statutes are, in case of *doubt,* to be given the construction *most favorable* to the taxpayer."

Mr. Justice Roberts' reasoning in the opinion squares with the holdings referred to in the above cited cases and means that when payments are received or *contracted* to be received before taxing acts come into being, those payments can not be made a proper *basis* of *taxation* by subsequent legislation.

Petitioners contend the contract payments collected in the taxable years are not subject to tax as the realization of obligations created and existing before the XVI Amendment. In *Crile v. Commissioner,* 55 Fed.

(2) 804, (C. C. A.-6), a sum of money was paid to taxpayer as part consideration of a lease and the Court says:

> "Where, there is an intent to create in the 'lessee' an interest in the property itself—as by way of purchase,—even though that interest may be forfeitable by failure to perform conditions subsequent, and this intent is made manifest by the instruments duly executed to carry it into effect, the attending payment is a return of capital, and should be so regarded, at least prior to forfeiture and reversion."

Therefore, as there was here an admitted sale, the payment of purchase money is a return of capital. As the vendor is without further interest in the property neither he nor his assigns can claim depreciation or depletion as to the property conveyed.

Petitioners raised the point that for all purposes, including purposes of taxation, the statutes and rules of property in a state were controlling in the Federal Courts. This Court's decision and opinion discounts this contention, yet in *Hernandez, Collector v. Becker,* 54 F. (2d) 544, dealing with a federal estate tax, Judge Phillips held the character of the estate from which the federal tax came was controlled by the statutes and rules of property of the state.

In *Harmel v. Commissioner,* Fed. (2) (C. C. A.-5), the rule that an oil and gas lease conveys a determinable fee to minerals in place under the Texas laws and rules of property is expressly upheld, and the special capital gain provision instead of the general tax upon ordinary income, as provided in the Revenue Acts, is

held to measure the income tax liability upon the resulting gain to the taxpayer.

Petitioners raised the point that the Collector and the Commissioners were in privity and a judgment against one was binding against the other. This Court discredited that position, yet *Second National Bank v. Woodworth,* 54 F. (2) 672 (Judge Simons) holds a collector of internal revenue is agent or trustee for the government and refers to and discusses at length Mr. Justice Holmes' decision in the *Sage* case, relied on in the opinion (250 U. S. 33), and his remarks are applicable to the instant cases:

> "There is an important distinction between the facts of the case at bar and those of the *Sage* case."

The distinction in the *Woodworth* case is that the judgment put forward in bar by the Collector is one against the United States, whereas in the *Sage* case the judgment so put forward by the United States was against the Collector. In the *Woodworth* case, the judgment in bar is held sufficient on the ground that, as the suit is against the Collector by reason of his official acts as a public officer and official agent or trustee of the Government, therefore:

> "It may be conceded that a judgment against an agent does not bind the principal, but that is not to say that the converse is true, and that a judgment against the principal is not a bar against the agent, where the latter is privy with the former in respect to the subject matter of the suit."

Judge Simon, after suggesting the argument of Mr. Justice Holmes is *dicta,* rests his decision not directly upon *Sage v. United States,* but upon *Bank of Kentucky v. Stone,* 174 U. S. 799, 43 L. Ed. 1187, wherein a judgment enjoining a town from enforcing a tax was held to bar a similar proceeding against its board of assessors.

In these present cases, the judgment is against the Collector, the agent and not the principal, the United States. That a judgment against its officer is not conclusive upon the United States has long been settled on the basic grounds that the Government cannot be sued without its consent that its officers may not waive this immunity, and that the Government cannot be compelled into Court to litigate with private parties in defense of its property, as decided in *Carr v. United States,* 98 U. S. 433, 25 L. Ed. 209. But that its officer may be sued and that its other officer in privity in the matter and aiding in defending the proceeding may be, and is, bound by the ensuing judgment, is not to say that the Government is likewise bound. But saying the Government is not bound is no justification for concluding its other officer is not bound. Thus, in *Johnson v. Herold,* 161 Fed. 593, 602, sixteen actions for recovery of identical taxes were brought against various collectors by the plaintiff, and a judgment in one case was held conclusive in the others, thus binding plaintiff or the collector not a party to the decided cause.

Without further quotation from the *Woodworth* opinion, attention is invited to the analysis of the *Sage* case in this most recent, well considered opinion, particularly the last paragraph and it would seem clear

that by reason and decision of the very highest court there is privity which should be recognized between *White, Collector,* and the *Commissioner of Internal Revenue* over the same subject matter—both are agents and trustees for the United States. In one case the tax illegally collected is returned, and in these cases the Commissioner is endeavoring to collect another illegally imposed tax. Both acts are by the agents and trustees of the principal. The agents are not personally liable. The right and reason of the *Woodworth* case is apparent.

Petitioners contend, if depletion is computable as an allowable deduction herein, same should be upon the basis of coal paid for and not of coal mined, pointing out that respondent took the same position before the Board. The Petition for Rehearing (pp. 22-26) discusses this issue, with some reference to *Murphy Oil Co. v. Burnet,* 55 F. (2) 17 (C. C. A.-9), wherein on January 11, 1932, the Board's position was held erroneous that payments for coal not mined constituted bonuses not subject to depletion allowances. This ruling was obtained by petition for review filed by respondent.

Judge Wilbur justifies this ruling first on the facts of the *Murphy* case, and then upon the development of the depletion principle as developed in statute, decision and regulation, and utterly destroys the Board concept which this Court has approved in its affirmance of the Board. He concludes:

> "The statute, with reference to depletion * * * is a special one * * * involving the pro-

> duction of oil and minerals from mines, and the consequent *return of capital by the owners of interests therein,* and controls over other general provisions of the law in regard to the return of capital investment." (Our italics.)

But, as decided above, a sale of mineral in place in Texas creates a determinable fee in the purchaser and the profit is taxable as a capital gain. As this Court has likewise decided, a sale of mineral in place in West Virginia was effected herein in 1902. As said in the *Crile* decision, *supra,* the creation of an interest in the "lessee" made the consideration a return of capital. It follows petitioners are not the owners of any interests in the mines or coal, and cannot avail themselves of depletion allowances, nor have same forced upon them.

In Conclusion.

This application is lengthy and yet incomplete, and full understanding of the facts and law depend upon verbal presentation and discussion of their aspects that the simple truth may appear. But the present and future stress of the taxpayers make such application imperative, and, with due apology that no imposition upon the time or patience of the Court or its members is intended, still these requests are made:

1. That this petition and application be permitted to be filed.

2. That opportunity be granted the parties to appear at an early date and orally present argument as to the propriety of a rehearing.

3. That upon rehearing the petitioners be declared not liable for income and profits taxes upon the contract proceeds from the sales of coal in place effected before the XVI Amendment.

Respectfully submitted,

D. J. F. STROTHER,
BANKERS POCAHONTAS
COAL CO.,
Petitioners.

By WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys.

Certificate of Counsel.

We, Wells Goodykoontz and Camden R. McAtee, attorneys of record for the petitioners in the above styled cases for review, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

(S.) WELLS GOODYKOONTZ,
(S.) CAMDEN R. McATEE,
Attorneys for Petitioners,
Bankers Pocahontas Coal Co.,
D. J. F. Strother.

ORDER DENYING REHEARING AND STAYING MANDATE.

Filed and Entered April 29, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 3215.

Bankers Pocahontas Coal Company, Petitioner.

vs.

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

On Consideration of the supplemental petition of the petitioner for a rehearing of the above entitled cause, filed by leave of Court on April 12, 1932,

It Is Now Here Ordered by this Court that the rehearing asked for in the supplemental petition be, and the same is hereby, denied.

It Is Further Ordered that the mandate of this Court in this cause be, and the same is hereby, stayed pending the application of the petitioner in the Supreme Court of the United States for a writ of *certiorari* to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is presented in the said Supreme Court on or before May 23, 1932.

April 29, 1932.

JOHN J. PARKER,
Senior Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause, as the same remain among the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 7th day of May, A. D., 1932.

(Seal of Court)

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for argument immediately following case No. 80, Murphy Oil Co. vs. Burnet, Commissioner of Internal Revenue.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,801. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 104. Bankers Pocahontas Coal Company, petitioner, vs. Commissioner of Internal Revenue. Petition for writ of certiorari and exhibits thereto. Filed May 23, 1932. File No. 36,801.